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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-394

ROBERT MORGAN,

Petitioner,

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, one of the plaintiffs in the proceedings below, respectfully prays that a writ of certiorari issue to review the judgment of the court of appeals entered on June 4, 1973.

OPINIONS BELOW.

The opinion of the court of appeals reversing the district court (reported in 1973 T-C ¶ 74,540) is reprinted in the Appendix, *infra*, pp. A2-A18. The opinion of the district court denying respondents' Motion to Dismiss is reported at 52 F. R. D. 398 (C. D. Cal. 1970), 1970 T. C. ¶ 73,318 and appears in the Appendix, *infra*, pp. A20-A30.

JURISDICTION.

The judgment of the court of appeals was entered on June 4, 1973 (Appendix, *infra*, p. A19). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

This case raises an important and persistently troublesome issue in the administration and application of the Federal Antitrust Laws:

1. Was standing to sue for treble damages under Section 4 of the Clayton Act properly denied petitioner, a farmer who was concededly injured in his business and property as a direct result of an alleged conspiracy by automobile manufacturers to suppress the development of air pollution control technology?

In addition, two significant subsidiary issues are raised:

2. To what extent can a consolidation under 28 U. S. C. § 1407 wreak a change in the rules of law applicable to the sufficiency of a complaint in an antitrust action?

3. Did the court of appeals err in construing the allegations of the complaint narrowly and thereby holding that petitioner was not within the "target area" of an alleged anti-competitive conspiracy?

STATUTE INVOLVED.

Section 4 of the Clayton Act, 15 U. S. C. § 15, 38 Stat. 731 (1914) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE.

This petition presents a threshold question of law arising out of the celebrated *In Re Multidistrict-Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment.* The litigation consists of numerous private antitrust claims filed throughout the country against the domestic auto makers and consolidated for pretrial purposes in the Central District of California. Following the lead of the federal government, which charged the automobile industry with violation of the antitrust laws in the "development" of air pollution control technology,[1] numerous private actions were filed against the big four auto makers and others under Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15, 26. The private suits alleged unlawful conspiracy under Section 1 of the Sherman Act. Damages for past harm and injunctive relief from future injury were sought. Various plaintiffs brought individual and class actions including all persons or residents of the United States, persons within states and political subdivisions, all persons injured in their property or business, and governmental entities suing on behalf of their citizens and as representatives of governmental agencies. Petitioner, a crop farmer, brought suit on his own behalf and as a representative of all other crop farmers in the United States.

On September 4, 1970, the district court denied the defendants' motions to dismiss for lack of standing under Sections 4 and 16 of the Clayton Act and upheld certain *parens patriae* claims. The court also granted class action motions except those on behalf of all persons and residents of the United States and governmental entities suing on behalf of individual residents.

1. In the Government suit, defendants consented to the entry of a decree proscribing future violation of the antitrust laws. 1970 T. C. ¶ 73,070.

Defendants took a certified interlocutory appeal to the Ninth Circuit from the district court (under 28 U. S. C. § 1292(b)). This appeal resulted, on June 4, 1973, in reversal of the district court's denial of the motion to dismiss with respect to *all* claims for damages arising under Section 4 of the Clayton Act. In each case the justification for dismissal was lack of standing to sue. The court of appeals held that all individual plaintiffs except farmers and all governmental plaintiffs including governments' individual claims, class claims and *parens patriae* claims failed to alleged injury to business or property. The court found that only petitioner alleged injury to business or property within the meaning of Section 4. Although petitioner *was* concededly injured in his business and property, the court also dismissed his cause of action for failure to allege any injury "by reason of" a violation of the antitrust laws. This result was reached because the court of appeals read the Complaint narrowly to allege only a combination or conspiracy to eliminate competition in the research, development and marketing of air pollution control equipment to the auto companies themselves. Having construed the Complaint in this light, the court then held that petitioner, as a farmer, was not within the "target" area of the conspiracy and hence lacked standing to sue for damages under Section 4.

Nevertheless, despite dismissal of petitioner's and all other *damage* claims, the court of appeals simultaneously upheld another portion of the district court opinion and allowed all of the claims for *injunctive relief* to proceed.

In his complaint, petitioner alleged a combination and conspiracy to eliminate competition and retard innovation in the development, marketing and installation of air pollution control equipment (Paragraph 22(a) of petitioner's complaint [2]). This conspiracy was implemented

2. Hereinafter referenced as "Pet. Complaint."

partially by restraining competition among the auto manufacturers in the promotion, marketing and installation of such devices. Petitioner argued below that this was done to thrust the costs of pollution control onto others, including petitioner. Petitioner also alleged damage to his crops during the period of the conspiracy as a result of the pollution emitted by automobiles (Pet. Complaint ¶ 26).

Under the cover of a joint research and development scheme promoted as achieving economies of scale and diversifying the costs and risks of development, the auto industry established an elaborate collusive arrangement through the industry trade association, the Automobile Manufacturers Association (Pet. Complaint ¶¶ 21, 22). This scheme was implemented to coordinate and police a secret agreement to suppress the development and installation of automobile pollution control devices (Pet. Complaint ¶ 23(c)). The agreement was industry-wide and was partially embodied in a cross licensing agreement signed by the manufacturers. The purpose of this horizontal arrangement was to assure *collusive suppression* as opposed to independent development of air pollution technology (Pet. Complaint ¶¶ 21, 22, 23). Where outright suppression was not possible due to regulatory pressure and knowledge of the state of the art, delay of research and installation and hindrance of state or local legislation imposing mandatory controls became the goal. After the execution of the cross licensing agreement and the assumption of the role of directing the conspiracy by the Automobile Manufacturers Association, a serious retardation took place in applied and basic research and in the implementation of technology once it came into existence (Pet. Complaint ¶ 24(a)).

This case was prosecuted in the lower courts by petitioner and others as an *antitrust*, not an environmental, action. Petitioner alleged that his injuries arose because of

anticompetitive activity in violation of Section 1 of the Sherman Act.

The decision for which review is sought is concerned solely with standing to sue for treble damages under the nation's antitrust laws. It does *not* concern either the merits of petitioner's claims or the propriety of any of the class actions.

REASONS FOR GRANTING THE WRIT.

Introduction.

This case poses a question of crucial importance to the administration and application of the nation's antitrust laws. As the court of appeals itself recognized, the issue of who has standing to sue for treble damages under Section 4 of the Clayton Act has beleaguered and divided the circuits. There are two major conflicting "tests" which the courts of appeal have devised to limit standing under Section 4. Despite the fact that every circuit uses one of these tests, or some combination thereof, both are shockingly deficient and both run contrary to the established decisions of this Court.

Furthermore, petitioner's complaint was filed in the Eastern District of Pennsylvania (in the Third Circuit) and consolidated for pretrial proceedings in the Central District of California. Petitioner's case would have been remanded to the Third Circuit for trial. In dismissing his complaint, the Ninth Circuit panel flouted the purposes of 28 U. S. C. § 1407 by applying a test which it *expressly conceded* contradicted the test applied in the Third Circuit.

Finally, it appears that the court of appeals purposefully construed petitioner's complaint in the narrowest possible fashion so as to conform to its "target area" test and still defeat the action for damages. Blatant contravention of federal standards on the liberal construction of pleadings, particularly in the antitrust field, should not be tolerated in a case of this public importance.

Petitioner respectfully urges that the writ issue to clarify a significant question of federal law and terminate the stark conflicts which prevail in the lower federal courts.

I. The Circuits Are Hopelessly Divided on the Proper Criteria for Standing Under Section 4 of the Clayton Act.

The issue of who has standing to sue for treble damages under Section 4 of the Clayton Act has perplexed and divided the lower federal courts. All of the circuits have spoken on the issue, and the only agreement has been on the point that "remote" or "incidentally" damaged parties cannot sue to redress antitrust violations. However, no single set of criteria has dominated the colloquy between the circuits on this question.

The Ninth Circuit candidly recognized this confusion in its decision. Commenting on a dictum in *Hawaii v. Standard Oil Co. of California*, 405 U. S. 251 (1972), the panel, while analyzing the prevailing positions as falling basically in two major "camps", carefully noted the division among the circuits:

> "Although the Court [referring to this Court] cited cases in support from every circuit, it failed to distinguish *essentially two disparate analytical techniques*—the 'direct injury' and the 'target area' approaches [6]—employed by different circuits.[7] [Emphasis added.]

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6. We have employed the terms "target area" and "direct injury" only as convenient, shorthand methods of identifying the two major approaches to the interpretation of "by reason of" [in Section 4 of the Clayton Act]. Use of either label in other cases, in contrast, has frequently suggested an approach opposite that so denominated here. E.g., Perkins v. Standard Oil Co., 396 F. 2d 809 (9th Cir. 1968) (Court labeled approach "target area" but employed the "direct injury" analysis), *rev'd.* 395 U. S. 642 (1969). Likewise, some courts have failed to perceive significant distinctions between the tests. *E.g.*, Nationwide Auto Appraiser Serv., Inc. v. Ass'n. of Cas. & Sur. Cos., 382 F. 2d 925 (10th Cir. 1967). It is to be hoped that the resolution suggested in our present opinion will obviate the use of either label in the future.

7. We do not mean to imply that each circuit falls neatly into one of the two pigeonholes. Only the Eighth Circuit and

7. (Cont'd.)

ours, for example, have consistently followed the "target area" approach, *e.g.*, Mulvey v. Samuel Goldwyn Productions, 433 F. 2d 1073 (9th Cir. 1970); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F. 2d 679, 688-89 (8th Cir. 1966) (Blackmun, J.), and even they have diverged occasionally. *E.g.*, Perkins v. Standard Oil Co., *supra* note 6. The First, Third, Sixth and Tenth Circuits, on the other hand, generally apply the test we label "direct injury". *E.g.*, Reibert v. Atlantic Richfield Co., 471 F. 2d 727 (10th Cir. 1973); Kauffman v. Dreyfus Fund, 434 F. 2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971); Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F. 2d 383, 394-95 (6th Cir. 1962); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F. 2d 758 (1st Cir.), *cert. denied*, 355 U. S. 828 (1957). The Second, Fourth and Fifth Circuits have formulated their own particular mixtures of the two tests, *e.g.*, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F. 2d 1292 (2d Cir. 1971); Dailey v. Quality School Plan, Inc., 380 F. 2d 484 (5th Cir. 1967); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F. 2d 414 (4th Cir. 1966), although the approach of the Second more closely resembles the "direct injury" test and that of the Fourth and Fifth the test of "target area". The Seventh Circuit's approach is uncertain, although it appears closer to "target area". *Compare* Sandidge v. Rogers, 256 F. 2d 269 (7th Cir. 1958) *with* Congress Building Corp. v. Loews, Inc., 246 F. 2d 587 (7th Cir. 1957). In ascribing positions to the various Circuits, we have ignored self-descriptions and have attempted to analyze their actual approaches."

[The above footnotes are quoted verbatim from the court of appeals' opinion in the instant case.]

Without elaboration upon any disputes with the Ninth Circuit's characterization of positions taken by the various circuits (and their correctness), petitioner adopts the court of appeals' accurate portrayal of the state of anarchy which presently surrounds this question. Furthermore, in view of the crucial importance of private treble-damage actions as part of the regulatory scheme of the Sherman and Clayton Acts,[3] the issue of who has standing to sue

3. See, e.g., *Hawaii v. Standard Oil Co. of California*, 405 U. S. 251, 262 (1972).

for damages under those provisions cannot be deprecated in importance.

The Ninth Circuit went on to criticize the so-called "direct injury" test as arbitrary and unjustifiably technical. Petitioner would contend that the panel then proceeded to apply the "target area" test in precisely the same arbitrary manner which they criticized in the application of the "direct injury" test. However, irrespective of which test is preferable, it is plain that the lower federal courts are floundering about in considerable disarray. The law is different in almost every circuit. The necessity for enunciation and clarification of the correct standard is readily apparent. On this basis alone, the writ should issue to resolve an important question that has consistently proven to be a major stumbling block in the administration of federal antitrust law.

II. The Ninth Circuit Standard Should Not Be Applied to Dismiss Complaints Consolidated for Pretrial Purposes Under 28 U. S. C. § 1407.

Upon defendants' motion, these actions were consolidated in the Central District of California, under 28 U. S. C. § 1407, for pretrial purposes only. *In re Motor Vehicle Air Pollution Control Equipment,* 311 F. Supp. 1349 (J. P. M. L. 1970). They were filed in various sections of the country comprising different circuits. Petitioner's complaint was filed in the Eastern District of Pennsylvania. This district is in the Third Circuit, which, as the court of appeals expressly concedes (see page 9, *supra*), generally applies the opposing "direct injury" test to determine standing under Section 4 of the Clayton Act. Hence, the Ninth Circuit panel applied its *contradictory* test to dismiss a complaint which properly fit the standing requirements imposed by the Third Circuit. This, it is

submitted, exceeds the proper bounds of the court of appeals' discretion under 28 U. S. C. § 1407.

A subsidiary question to the issue of petitioner's standing is thus presented: To what extent can a consolidation under 28 U. S. C. § 1407 wreak a change in the rules of law applicable to an antitrust action?

The issue of which law governs when there is a consolidation in another jurisdiction or circuit under § 1407 has never been expressly settled by this Court. However, the purposes of the statute indicate clearly that it is merely a *procedural* device designed to expedite the handling of complex litigation in the federal courts. This is evident from the fact that actions are consolidated for pretrial purposes only, and the consolidation district *remands* the actions for trial to the respective forums in which they were brought. Furthermore, the statute deals in *terms* with "civil actions involving one or more common questions of fact. . . ." [Emphasis added.] 28 U. S. C. § 1407(a). Nowhere is the consolidation forum empowered to contravene the law applied in the original court and dismiss a complaint.

Indeed, the only provision analogous to 28 U. S. C. § 1407 is the "permissive change of venue" statute—28 U. S. C. § 1404(a). Unlike § 1407, a change of venue under § 1404(a) is *permanent*, and the action proceeds to trial in the transferee forum. However, this Court has already held that where the law differs in the two districts, the *law of the transferor forum governs. Van Dusen v. Barrack*, 376 U. S. 612, 84 S. Ct. 805 (1964). In *Van Dusen*, the Court ensured that a defendant could not effect a change of law merely by seeking a change of venue for the "convenience of parties and witnesses":

> "Of course these cases allow plaintiffs to retain whatever advantages may flow from the state laws of the

> forum they have initially selected. There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue. * * *
>
> * * *
>
> The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.' Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a). If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument. And, more importantly, courts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum. We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms." 376 U. S. at 634-636.

The only arguable distinction between *Van Dusen* and the instant case is that the differing laws in *Van Dusen* stemmed from the diversity jurisdiction (differing state laws governing scope of recovery in airline crashes), whereas here it is the circuits which are at odds. In view of the identical policy considerations, however, this must be deemed a distinction without a difference. Forum shopping between circuits is as counterproductive as forum shopping between jurisdictions. Furthermore, why should

plaintiff's proper choice of forum be entitled to less weight where the law differs between *circuits*, as opposed to *states*?

Most important, petitioner's case would ultimately proceed to trial in the Eastern District of Pennsylvania. The result below indicates that defendants can impose the law of the Ninth Circuit upon the Third Circuit merely by seeking consolidation for pretrial purposes. Even more than § 1404(a), this is a fatuous conclusion with absolutely no support in the language or the purposes of § 1407. The district court recognized its limited role in the administration of these actions. Appendix, *infra*, p. A23. Nevertheless, the Ninth Circuit panel chose to discard the appropriately reserved opinion of the district judge and impose its view of the law on a case properly brought in the Third Circuit.

This outcome points up the overreaching position of the court of appeals below. Furthermore, the decision runs contrary to the established rule in *Van Dusen v. Barrack*, *supra*. Finally, it highlights the express contradiction among the circuits which begs for resolution in this Court.

III. The Artificial Tests of Standing Applied by the Court of Appeals and Other Lower Courts Run Contrary to This Court's Construction of Section 4 of the Clayton Act.

Both the "direct injury" and "target area" tests, as elucidated by the opinion below, attempt to read new standing requirements into Section 4 and limit the number of potential litigants. Thus, the *concept* of both tests is similar. The "direct injury" test relates to outmoded notions of privity. By contrast, the so-called "target area" test narrows the field to litigants who were the purported "targets" of the conspiracy and thus turns upon the professed or inferred "intent" of the wrongdoers. Both tests

ignore the "injury in fact" standard repeatedly applied by this Court. Finally, both tests are wholly insufficient to deal with the very real problems posed by a modern market economy. [see Part V, *infra*]

A. This Court Does Not Recognize the Standing Requirement Imposed Below.

This Court has never read either the requirement of "direct" injury or "target area" of the conspiracy into Section 4. When the Court has had occasion to comment or rule on the sufficiency of the complaint in the light of Section 4, *injury in fact*—as opposed to "direct" or "intended" injury—has been adequate to establish standing where plaintiff met the other standing requirements set forth in the statute. In *Radovich v. The National Football League*, 352 U. S. 445 (1957), this Court upheld a litigant's standing to sue where the plaintiff was a football player and the victim of a larger monopoly scheme directed at a *competitor* football league:

> "Petitioner's claim need only be 'treated under the Sherman Act's general prohibition on unreasonable restraints of trade', [citation omitted] and meet the requirement that petitioner has thereby suffered injury." 352 U. S. 445, 453

Similarly, in *Radiant Burners v. Peoples Gas Light and Coke Co.*, 364 U. S. 656 (1961), this Court declared:

> "Therefore, to state a claim upon which relief may be granted under that Section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." 364 U. S. 656, 660 (1961)

And in *Hawaii v. Standard Oil Company of California*, 405 U. S. 251 (1972), this Court stated that in Section 4:

> "Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation". 405 U. S. 251, 262 (1972)

Although the Court dismissed the State of Hawaii's claim, it did so on the grounds that Hawaii had no standing to sue in a *parens patriae* capacity for its citizens or for damage to its "general economy".

Injury in fact confers standing under Section 4 because suit by a victim of an antitrust violation advances the fundamental purposes of the antitrust laws. A person injured in fact by conduct condemned by these laws is within the class of protected persons. This principle was expressly stated in *Radovich v. The National Football League, supra,* where the Court said: "These laws protect the victims of forbidden practices as well as the public". 352 U. S. 447, 454.

Within the class of "victims" the Court has never limited protection to favored members. Rather, in *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219 (1948), this Court declared:

> "The Act is comprehensive in its terms and coverage, protecting all those who are made victims of the forbidden practices by whomever they may be perpetrated." 334 U. S. 219, 236

For remedial purposes, then, the Court has stated that victims of an antitrust violation as well as the public are entitled to protection and may invoke the rights to redress created by Section 4 of the Clayton Act.

The victim of an antitrust violation is assured standing under Section 4 for fundamental reasons other than protection and compensation. The victim sues as a

"private attorney general" to vindicate public antitrust policy and to deter future violations. Thus, in *Radovich, supra,* the Court stated:

> "Congress has by legislative fiat declared that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party." 352 U. S. 447, 453-454

And in *Hawaii, supra,* the Court declared:

> "By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general'." 405 U. S. 251, 262

Since every victim is a potential private attorney general, the entire class has a mandate under Section 4. This policy maximizes the enforcement potential of the statute, an objective intended by Congress and repeatedly endorsed by this Court.[4] Moreover, the special enforcement role accorded the private antitrust litigant by Congress mandates that technical requirements not be employed to defeat lawsuits where serious harm has in fact ensued.

In short, the Court has already resolved this issue by conferring standing on parties injured in fact by a violation of the antitrust laws. Their identity is determined by focusing on the *harm* of the violation and the *victims* of the harm, not on the proximity of the victim to the violator or the directness of the victim's injury. Rather than opening the federal courts to a "flood" of litigation, this standard

4. See *United States v. Borden Co.*, 308 U. S. 188 (1939); *Lawlor v. National Screen Service Corp.*, 349 U. S. 322 (1955); *Hawaii v. Standard Oil Co. of California, supra; Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100 (1969); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968); *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing*, 381 U. S. 311 (1965).

merely ensures that the *proper* plaintiff is brought before the court.

The two most recent decisions by this Court, *Perkins v. Standard Oil Co. of California*, 395 U. S. 642 (1969), and *Hawaii v. Standard Oil Co. of California, supra*, reaffirm this requirement of injury in fact.

Perkins involved an action brought under Section 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13 and Section 4 of the Clayton Act. In *Perkins*, the Ninth Circuit had held that plaintiff was only incidentally injured by a price discrimination where he was sold gasoline on the retail level and where the price discriminator was a manufacturer who sold bulk to two intermediaries before the gasoline reached the retail level. This Court found that analysis to be "artificial and completely unwarranted by the language and the purpose of the Act", 395 U. S. 642, and reversed the court of appeals. The Court also permitted Perkins to recover in his capacity as a landlord and creditor, two classes of plaintiffs traditionally excluded by the arbitrary standing requirement of "target" or "direct" injury. Noting that Perkins was the principal victim of the violation, he was entitled to submit all his damages to the jury. 395 U. S. 642, 650.

The impact of *Perkins* is apparent in light of the important function of the private antitrust action. The Court focused primarily upon implementing the purposes and policies underlying the Act. In overruling the court of appeals' dismissal on the basis of a conceptual determination of incidental injury, the Court stressed that the ruling below immunized the violator from liability and undermined the purpose of the statute. 395 U. S. at 647-48. *Perkins* thus illustrates that no artificial limitation should be placed on victims injured in their business and property and willing to sue to vindicate public policy. In a refer-

ence to the direct-incidental injury conundrum created by the court below in *Perkins,* this Court held standing dependent upon the *harm* to the victim, not his relationship or proximity to the defendant.

Applying the principles of *Perkins* and earlier cases to the facts of this case, the Ninth Circuit is plainly in error. Unquestionably, petitioner is a victim of a violation giving rise to a unique harm to petitioner; he has been injured in fact by reason of defendants' alleged anticompetitive activities. He sues to condemn a new variation of an old forbidden practice: conspiracy among manufacturers in the market to rig their conduct and performance, in this case innovations in automobile pollution control technology. Unquestionably he advances the public policies underlying Section 4 of the Clayton Act and the substantive policies underlying Section 1 of the Sherman Act: he sues to enforce the Sherman Act prohibition, to deter further and future violations by the auto makers and other large firms in tight knit markets characterized by few competitors, and to redress his own injuries. Finally, dismissal wrongly immunizes the violators from liability.

The decision in *Hawaii v. Standard Oil Co. of California, supra,* in no way vitiates the significance of *Perkins.* Nor can *Hawaii* be construed to foreclose petitioner in this case. In *Hawaii,* the Court found that the State of Hawaii had suffered no "injury to business or property" within the meaning of Section 4 by alleging injury to the "general economy" of the State. 405 U. S. 251, 263. To make this determination, the Court looked to the purpose of Section 4, not to an arbitrary test of injury or directness of injury. The Court found that all persons were entitled to sue every time they were injured in their business or property by a violation of the antitrust laws. Violators, however, were not required to reimburse state and federal governments for duplicative damage to their respective economies. With

respect to the issue of injury in the instant case, the Ninth Circuit panel below expressly conceded that petitioner was injured in his business and property within the meaning of Section 4. Appendix, *infra*, p. A6. For this reason alone, *Hawaii* cannot stand as a bar to petitioner's antitrust claims.

B. Dictum in Hawaii, Relied Upon by the Court of Appeals, Is No Bar to Petitioner's Claim.

In *Hawaii*, the Court intimated in a footnote that under certain circumstances it might be willing to limit the ambit of Section 4.[5] Although the footnote leaves the contours of such a limitation entirely unresolved, in the body of the opinion the Court expressed concern for the situation which might give rise to additional standing requirements: selection of the proper party litigant so as to avoid double or treble recoveries (by multiple parties) for the same injury. 405 U. S. 251, 263-64. The possibility of such a recovery is frequently present in the antitrust context, where several persons are in a position to sue for the *same injury* and where a plaintiff, suing under Section 4, derived his injury from another victim of the violation. In this setting, a policy reason might exist for curtailing liability—assuming the most logical plaintiff could be induced to sue.

However, the problem of double recovery for the same injury has no application to this case. Unlike *Hawaii*, where the injury to the general economy consisted in part of damages to individual consumers and businesses, petitioner here sues as a victim in his own right. The purpose of automobile pollution control is to protect petitioner from

5. Footnote 14 of *Hawaii* reads, in pertinent part:

"The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation [citations omitted].

harm to his business and property resulting from air pollution. Therefore, he is a principal and immediate victim of the auto makers' industry-wide agreement to suppress pollution controls. He suffers a unique harm, underived from any third party. The proof of this proposition is the absence of any other person in a position to recover for his damages. Thus, there is no threat of double recovery in the instant case, and the court of appeals' reliance on *Hawaii* was misplaced.

Finally, circumspect use of standing requirements also follows implicitly from this Court's oft-expressed view that private plaintiffs should not be required to overcome artificial barriers to assert rights under the antitrust laws, particularly requirements not specifically adumbrated in Section 4.[6]

IV. The Court of Appeals Read the Complaint Narrowly in an Unwarranted Attempt to Defeat It.

The alleged violation is a variation of restrictive horizontal trade practices which have been uniformly condemned since the enactment of the antitrust laws. Unlike collusion to fix prices or allocate market shares, this conspiracy to rig performance in the market was aimed at another competitive variable: innovation. The injury to competition lies in the stifling of competitive performance in

6. For example, the Court has eliminated the requirement of alleging and showing public injury as well as private injury to the plaintiff. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); *Radovich, supra;* and *Radiant-Burners, supra.* Similarly, concerning the issue of a causal connection between the injury and the illegal acts of the violator, the Court has eliminated the requirement that the violation be the "only" factor or that it produce the effect with "certainty". See *Poller v. Columbia Broadcasting System*, 368 U. S. 462 (1962) and *Bigelow v. R. K. O. Radio Pictures*, 327 U. S. 251 (1946). Also see *Zenith Radio Corp., supra*, and *Bigelow, supra*, on the liberal requirements of proof of damage.

the development of new technology and systems controlling automobile emissions. The facts alleged in the complaint (which must be taken as valid for purposes of the motion to dismiss) indicate that market forces unrestrained by collusion would have produced controls far sooner than the industry's self-proclaimed "joint development" effort.

This horizontal agreement within the automobile industry to retard a solution to air pollution is a classic illustration of the anti-competitive behavior of tight knit oligopolies in areas other than price. The motives underlying this conspiracy were two-fold: First, independent and unrestrained development posed a threat to market stability, particularly market share; second, the industry regarded the development of pollution controls as a "pure cost" incapable of transformation into new sales and higher profits and to be avoided entirely or limited as much as possible—lest the research, development and implementation costs adversely affect profitability.

In short, under the oligopolistic conditions prevailing in the auto industry at the time of the cross-licensing agreement, the development of air pollution control systems by a single firm would have conferred a temporary competitive advantage upon that firm, and would have compelled the rest of the industry to offset that edge by innovation of their own. The complaint alleges that certain jurisdictions were prepared to require pollution-control devices if the technology were available (Pet. Complaint ¶ 23(c)(2) & (3)).

Taking the complaint as a whole, petitioner adequately alleged the foregoing violation to restrain competition in the automobile industry. However, the court of appeals construed the complaint narrowly as alleging only a violation to restrain competition in the market for air pollution control equipment through an exclusion of potential competitors into that market. The court assumed this unwarranted and narrow position despite repeated efforts in both

written and oral argument and allegations in the complaint which suggested a wider—and more obvious—purpose to the conspiracy. Thus, the complaint alleges that the industry entered into an agreement to develop air pollution technology on a "non-competitive basis", implying that the automobile makers were limiting innovations which might upset the stability of the market and lead to increased rivalry (Pet. Complaint ¶ 23(a)). The complaint further alleges a concerted effort to delay implementation of air pollution controls once the systems came into existence. (Pet. Complaint ¶ 23(c)). This suggests an attempt to limit and/or avoid the *cost* of developing controls, thus involuntarily thrusting these costs upon petitioner and others.

This unjustifiable constriction of the scope of petitioner's complaint, undertaken to conform to the requirements of the Ninth Circuit's so-called "target area" test, runs squarely contrary to the mandate of this Court. Complaints are to be construed *liberally* in the interests of justice. Federal Rules of Civil Procedure, Rule 8(f); *Conley v. Gibson*, 355 U. S. 41 (1957). Liberal construction of pleadings is deemed doubly important in antitrust cases. *Radiant Burners v. Peoples Gas Light & Coke Co., supra; Radovich v. The National Football League, supra.* See also *Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962), where the Court rejected summary judgment as a viable procedural device in antitrust cases.

By contrast, the court of appeals here has purposefully taken the narrowest possible view of the conspiracy alleged by petitioner. In essence, the court wore blinders to facilitate the application of a disputed rule of law.

V. The Decision Below Undermines Proper Administration of the Antitrust Laws.

As previously noted, the court of appeals permitted all *injunctive* claims to proceed even as the *damage* claims

were dismissed. Apparently, this was attributable both to the likelihood of continued harm, and the egregiousness of the alleged violations. It could also be construed as a concession to the high public visibility of this case.

In this context, judicial abrogation of the right to private relief under the antitrust laws, in a highly visible litigation, foreshadows a considerable diminution of the public's protection from concerted anti-competitive action. Businessmen, perceiving that courts will not impose liability for the full consequences of their actions, are less likely to be deterred from unlawful conspiracies undertaken with a complete disregard of public welfare. Certainly the prospect of substantial damages stands as a far greater deterrent than an injunction or judicial censure—the very reason for enactment of the treble-damage provision. Furthermore, other courts, observing the Ninth Circuit's action in a salient case, are likely to embellish their own already chaotic standing requirements. This can only represent a further departure from the concept of "private attorneys general" which the antitrust laws were designed to implement.

In the instant case, the complaint alleges that businessmen in some of the nation's largest corporations conspired to retard the development of automobile pollution control devices, thus thrusting the hidden costs of their product upon the unwilling public. Farmers, as cropgrowers, were forced to absorb a larger proportion of these unallocated costs than any other group. A denial of their "standing" to challenge an unlawful conspiracy of this magnitude can only operate as an invitation to exploitation and an abrogation of the private damage provisions of the antitrust laws.

An extensive review of the conflicting case law in the various circuits (see Part I *supra*) reveals four primary "public policies" or variations thereof underlying the

judicially created limitation on standing under Section 4: ruinous liability; the desire to eliminate groundless claims brought for the purpose of extorting a settlement; flood of litigation; and multiplicity of suits. The latter three rationales may be dismissed out of hand. A case of this public importance cannot be dismissed merely to diminish the "flood of litigation"—indeed, the injunctive claims are proceeding in the district court. If the allegations of the complaint are credited, as they must be on a motion to dismiss, spuriousness certainly does not warrant the result below.

"Ruinous" liability probably constitutes the principal policy rationale underlying the various standing limitations imposed by the lower federal courts. Whether described as the "target area" or "direct injury" test, these limitations have aimed towards circumscribing the so-called "ripple" effect of an antitrust violation in the commercial context.

This "ripple effect" may be described as follows: A single injury to one person is compounded through the general interdependency of prices and outputs in a market economy. In this situation, reasons may exist to cut off liability after the original victim since the three public policies underlying Section 4—enforcement, deterrence, and compensation—can generally be vindicated. Thus, in the case of derivative injury, the original victim sues to vindicate public antitrust policy, to deter further violation, and to recoup his damages. Moreover, derivative victims can recover their damages through the same mechanism which transmitted the injury from the violation in the first place if the original victim recovers his damages.

Where a litigant's claim does not raise the threat of double recovery, it is improper to cut off liability. To do so gives a windfall to the violator and frustrates all the

policies underlying the antitrust laws and the right of private action.[7]

Petitioner's claim poses no such threat of double recovery. Petitioner's injury is a "primary" injury. It is not derived from another victim of the violation situated between petitioner and the violator. It is not a by-product of the conspiratorial scheme. As alleged in the complaint, a basic purpose of the conspiracy was to avoid the price of developing controls by forcing farmers and others to absorb the entire cost of air pollution emitted by autos.

In this setting, the possibility of "ruinous liability" (which petitioner contends is unlikely) stems not from the "ripple effect" or interdependency of the nation's economy. Rather, if it looms at all, its source is the immense magnitude of the defendants' violations. Defendants cannot be excused from liability because of the outrageous scope of their own misconduct.

The novel context of petitioner's antitrust injury appears to have created the controversy in this case. Petitioner is not a competitor, a buyer, or a supplier of the auto makers, yet he suffered injury as the result of an antitrust violation. This is unusual in the antitrust setting.

The court of appeals alluded to the potential compelled use of air pollution devices as an "externality". (Appendix, *infra*, p. A3). Petitioner has no objection to such a description (a technical term of economists, not

7. The rejoinder that producers of pollution-control devices can sue to vindicate public policy is unpersuasive in the confines of this case. Unlike farmers and other parties injured by the resulting air pollution, producers of such devices are subject to several strong defenses by the manufacturers—notably that cost and other product ramifications would have required *internal* development and production of the devices. Furthermore, the propriety and extent of patents and the nature and quality of various parties' research are also at issue. These problems are completely irrelevant to petitioner's cause of action—which derives from the existence of the conspiracy and the readily foreseeable resultant harm. The "business justification" defense is totally inapplicable to petitioner's case.

lawyers), and assumes that the court was contemplating the so-called "hidden cost" effects of the automobile. These reflect the fact that air pollution is largely created by the automobile and causes injury accounting for serious costs to farmers and others. Such costs are not included in the market price of the automobile. That is to say, as the cost of air pollution increases due to increased automobile use, the cost of the car in the market place remains fixed. Unaware of the true cost to society of the automobile, buyers continue to purchase and use it based upon a faulty determination of its utility. The hidden cost effect is a blind spot in the market and makes it difficult for market economics to force automakers responsible for the noxious effects of their product to assume the burden of developing technology to eliminate them.

Petitioner would argue that, externality or not, petitioner's serious injury was the immediate result of an anticompetitive conspiracy, and he discerns no reason why public policy should treat "externalities" created by antitrust violations any differently than other injuries occasioned by unlawful horizontal collusion. In this regard, petitioner stresses that the court of appeals cannot properly dismiss petitioner's claim by labeling it an externality or analogizing it to some kind of incidental injury. Petitioner's injury is unrelated to the condition of general and moderate interdependency between prices and outputs in a market economy that gives rise to the so-called ripple effect of an antitrust violation.

Petitioner's injury is unique but palpable, underived from any third party. Externality or no, the auto industry has created a burdensome cost for him. He has no indirect or direct market relationship with the industry but has suffered injury as a primary result of an unlawful horizontal conspiracy.

In summation, the issue of petitioner's standing under Section 4 of the Clayton Act arises out of a claim which involves the interaction of two sets of operative facts. The nature of the antitrust violation is a conspiracy among the domestic auto makers to retard the development and installation of automobile air pollution control devices. The nature of petitioner's injury is damage to his business and property as a result of air pollution during the period of the retardation. The interaction between these two operative facts creates a cause of action unlike most traditional antitrust claims where the parties are typically located in the same industry.

However novel the context in which the claim arises, the injury upon which it is based is a traditional antitrust claim created by a violation of the antitrust laws and is no less concrete, immediate, or serious than a cause of action arising in a more typical antitrust setting. A consequence of environmental pollution condemned in large part for its effects on crops, petitioner's injury results from concerted, unlawful action. Just as purchasers pay higher prices due to price fixing conspiracies, or competitors are forced out of business as a result of schemes to dominate or control markets, petitioner has suffered injury from this conspiracy to suppress needed technological innovation. It is precisely the type of injury the antitrust laws are designed to prevent and redress.

CONCLUSION.

In conclusion, petitioner respectfully urges that the writ issue to resolve serious and persistent conflicts among the circuits, clarify a crucial issue of federal antitrust law, and correct a conspicuous decision which patently flouts the applicable precedents in this Court.

Respectfully submitted,

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Dated: August 31, 1973.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 71-1241.

IN RE MULTIDISTRICT VEHICLE AIR POLLUTION
M. D. L. No. 31

STATE OF CALIFORNIA, ET AL.,
Appellees,

v.

AUTOMOBILE MANUFACTURERS
ASSOCIATION, INC., ET AL.,
Appellants.

ROBERT MORGAN,
Appellee,

v.

AUTOMOBILE MANUFACTURERS
ASSOCIATION, INC., ET AL.,
Appellants.

CITY OF PHILADELPHIA, ET AL.,
Appellees,

v.

AUTOMOBILE MANUFACTURERS
ASSOCIATION, INC., ET AL.,
Appellants.

STATE OF NEW YORK,
Appellee,

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., ET AL.,
Appellants.

CITY OF NEW YORK, ET AL.,
Appellees,

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., ET AL.,
Appellants.

CITY AND COUNTY OF DENVER,
Appellees,

v.

AMERICAN MOTORS CORPORATION, ET AL.,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

Before: HAMLIN, BROWNING, and ELY, *Circuit Judges.*

OPINION.

ELY, *Circuit Judge:*

This certified interlocutory appeal under 28 U. S. C. § 1292(b) arises from pretrial proceedings in *Multidistrict*

Air Pollution Control Litigation (C. D. Cal. M. D. L. 31), which is a consolidation of numerous actions[1] under 28 U. S. C. § 1407. In re *Motor Vehicle Air Pollution Control Equipment*, 311 F. Supp. 1349 (Jud. Panel on Multidist. Lit. 1970). Since this appeal is from denial of motions to dismiss, factual allegations are cast most favorably to the appellees. *See Conley v. Gibson*, 355 U. S. 41 (1957).

As early as 1953, the nation's automobile manufacturers and their trade association allegedly conspired to eliminate competition among themselves in the research, development, manufacture, installation and patenting of automotive air pollution control devices. Appellees urge that this horizontal antitrust conspiracy was motivated: (1) by appellants' conviction that antipollution devices are externalities, whose development would increase price without a concomitant spur to consumer interest; (2) by the apprehension that the first competitor to perfect such a device would garner exclusive contracts with governmental purchasers; and (3) by the fear that technological realization of the devices would prompt laws compelling their use.[2]

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1. These are the progeny of a civil antitrust action filed by the federal government against the largest domestic automobile manufacturers and the Automobile Manufacturers' Association. In October of 1969, the Government accepted a consent decree, United States v. Automobile Mfgrs. Ass'n, 307 F. Supp. 617 (C. D. 1969) *aff'd per curiam sub nom.* New York v. United States, 397 U. S. 248 (1970), the text of which is reported in 1969 Trade Cas. ¶ 72,907.

Similar factual claims were presented to the original jurisdiction of the Supreme Court in Washington v. General Motors Corp., 406 U. S. 109 (1972). After the Court declined to assume jurisdiction in that case, and after this court accepted certification of the present appeal, an additional spate of actions was filed in the District Court under the multidistrict tag-along procedures.

2. Such compulsion would be unattractive to manufacturers insofar as required use of an externality would likely increase price while not necessarily increasing demand, thus diminishing overall product marketability and profit.

Appellees argue that this conspiracy inflicted financial losses that would not have occurred but for the conspiracy-induced absence of antipollution equipment. Governmental entity appellees claim losses resulting from diminution in value of, and expenditures in connection with, government property and interests. Crop farmer appellees assert direct damage to crop yields. Variously proceeding in their individual capacities, as *parens patriae* and as class representatives all appellees seek treble damages and equitable relief under sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15, 26.

On appeal, appellants challenge the district court's rulings that appellees have standing to sue under sections 4 and 16 of the Clayton Act, that certain appellees may proceed as *parens patriae,* and that others may proceed as class representatives under Fed. R. Civ. P. 23.

I. Standing Under Section 4.

Appellees ground their claims for treble damages on section 4 of the Clayton Act, 15 U. S. C. § 15, which reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Read literally, this statute could afford relief to all persons whose injuries are causally related to an antitrust violation. Recognizing the nearly limitless possibilities of such an interpretation, however, the judiciary quickly brushed

aside this construction.[3] Instead, a measured approach has prevailed; courts have impressed a standing doctrine so as to confine the availability of section 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws. *Cf. Barlow v. Collins*, 397 U. S. 159 (1970); *Association of Data Processing v. Camp*, 397 U. S. 150 (1970); *Mount Clemens Industries, Inc. v. Bell*, 464 F. 2d 339, 341-44 (9th Cir. 1972). Unfortunately, no "bright line" has yet emerged to divine this group, and courts have formulated varied definitions.

In this case, however, the District Court declined to apply any of the extant definitions, choosing instead to expand[4] the coverage of section 4:

> "We are now concerned with the phrase 'injured in his business or property *by reason of anything* forbidden in the antitrust laws' in the light of the allegations of these complaints, rather than the traditional legalistic approach defined by the cases cited by defendants in their motion to dismiss. Each of the plaintiffs allege injury to their respective business or property *by reason of* anti-trust violations of the defendants.
>
> "Plaintiffs may fail in their proof, but until then, they should be given the benefit of employing 'any

3. *See, e.g.*, Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910) (limiting standing under section 7 of the Sherman Act, predecessor of section 4 of the Clayton Act). *Cf.* Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 534 (1918) (Holmes, J.) ("the endlessness and futility of the effort to follow every transaction to its ultimate result"). *See also* L. Green, The Rationale of Proximate Cause 122-23, 195-97 (1927); Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Nw. U. L. Rev. 691, 697-700 (1963).

4. Even some commentators who have lauded the ingenuity of the district court's decision recognize its clear departure from prior law. *See, e.g.*, 12 B. C. Ind. & Com. L. Rev. 686 (1971); Note, 24 Vand. L. Rev. 126 (1970).

available remedy to make good the wrong done.'" [footnote citing *J.I. Case Co. v. Borak*, 377 U. S. 426, 433 (1964); *Bell v. Hood*, 327 U. S. 678, 684 (1946)].

52 F. R. D. 398, 401 (C. D. Cal. 1970). In the aftermath of the Supreme Court's recent decision in *Hawaii v. Standard Oil Co.*, 405 U. S. 251 (1972), however, we cannot so easily disregard the so-called "traditional legalistic approach of the cases . . . ."

Judicial constructions of standing under section 4 have keyed on the phrases "business or property" and "by reason of" as indicating twin requisites for standing. First, a plaintiff must allege injury to his "business or property", a term definitively limited to interests in commercial ventures or enterprises: "the words 'business or property' . . . refer to commercial interests or enterprises." *Hawaii, supra* at 264. *See Control Data Corp. v. IBM*, 306 F. Supp. 839, 845 (D. Minn. 1969) (corporate plaintiff not in legal existence at time of antitrust violation is without commercial injury). Secondly, a plaintiff must allege that the injury suffered was occasioned "by reason of" an antitrust violation. *Hawaii, supra* at 263-64 n. 14.

Applying the first predicate, since neither the governments' individual claims, nor their class claims, nor their *parens patriae* claims allege any injury to commercial ventures or enterprises, the governmental entities cannot seek recovery under section 4 of the Clayton Act. In contrast, the farmers satisfy the first requisite, since a diminished crop yield, for example, would constitute injury to commercial interests.

Application of the second prong of the standing formulation is more difficult since "by reason of" has consistently eluded efforts at uniform definition or applica-

tion. *Compare, e.g., Mulvey v. Samuel Goldwyn Productions*, 433 F. 2d 1073 (9th Cir. 1970) *with Fields Productions, Inc. v. United Artists Corp.*, 432 F. 2d 1010 (2d Cir. 1970), *aff'g per curiam* 318 F. Supp. 87 (S. D. N. Y. 1969), *cert. denied*, 401 U. S. 923 (1971); *and compare Steiner v. 20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956) *and Congress Building Corp. v. Loew's, Inc.*, 246 F. 2d 587 (7th Cir. 1957) *with Melrose Realty Co. v. Loew's, Inc.*, 234 F. 2d 518 (3d Cir.), *cert. denied*, 352 U. S. 890 (1956) *and Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954); *and compare Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (6th Cir. 1962), *cert. denied*, 372 U. S. 907 (1963) *with South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414 (9th Cir.), *cert. denied*, 385 U. S. 934 (1966). The resulting confusion prompted speculation that the Supreme Court would disapprove judicial application of "by reason of" to limit potential antitrust claimants.[5] In *Hawaii*, however, the Court appeared to approve the standing doctrine to require more from a would-be plaintiff than some remote connection in the causal chain.

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."

405 U. S. at 263 n. 14. Although the Court cited cases in support from every circuit, it failed to distinguish essentially two disparate analytical techniques—the "direct

5. *See, e.g.*, Klingsberg, *Bull's Eyes & Carom Shots*, XVI Antitrust Bull. 351, 368-69 (1971).

injury" and the "target area" approaches [6]—employed by different circuits.[7]

Courts adhering to the "direct injury" test focus principally on the relationship between the alleged anti-

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6. We have employed the terms "target area" and "direct injury" only as convenient, shorthand methods of identifying the two major approaches to the interpretation of "by reason of". Use of either label in other cases, in contrast, has frequently suggested an approach opposite that so denominated here. *E.g.*, Perkins v. Standard Oil Co., 396 F. 2d 809 (9th Cir. 1968) (court labeled approach "target area" but employed the "direct injury" analysis), *rev'd*, 395 U. S. 642 (1969). Likewise, some courts have failed to perceive significant distinctions between the tests. *E.g.*, Nationwide Auto Appraiser Serv., Inc. v. Ass'n of Cas. & Sur. Cos., 382 F. 2d 925 (10th Cir. 1967). It is to be hoped that the resolution suggested in our present opinion will obviate the use of either label in the future.

7. We do not mean to imply that each circuit falls neatly into one of the two pigeonholes. Only the Eighth Circuit and ours, for example, have consistently followed the "target area" approach, *e.g.*, Mulvey v. Samuel Goldwyn Productions, 433 F. 2d 1073 (9th Cir. 1970); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F. 2d 679, 688-89 (8th Cir. 1966) (Blackmun, J.), and even they have diverged occasionally. *E.g.*, Perkins v. Standard Oil Co., *supra* note 6. The First, Third, Sixth and Tenth Circuits, on the other hand, generally apply the test we label "direct injury". *E.g.*, Reibert v. Atlantic Richfield Co., 471 F. 2d 727 (10th Cir. 1973); Kauffman v. Dreyfus Fund, 434 F. 2d 727, 732-34 (3d Cir. 1970); *cert. denied*, 401 U. S. 974 (1971); Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F. 2d 383, 394-95 (6th Cir. 1962); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F. 2d 758 (1st Cir.), *cert. denied*, 355 U. S. 828 (1957). The Second, Fourth and Fifth Circuits have formulated their own particular mixtures of the two tests, *e.g.*, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F. 2d 1292 (2d Cir. 1971); Dailey v. Quality School Plan, Inc., 380 F. 2d 484 (5th Cir. 1967); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F. 2d 414 (4th Cir. 1966), although the approach of the Second more closely resembles the "direct injury" test and that of the Fourth and Fifth, the test of "target area". The Seventh Circuit's approach is uncertain, although it appears closer to "target area". *Compare* Sandidge v. Rogers, 256 F. 2d 269 (7th Cir. 1958) *with* Congress Building Corp. v. Loews, Inc., 246 F. 2d 587 (7th Cir. 1957). In ascribing positions to the various Circuits, we have ignored self-descriptions and have attempted to analyze their actual approaches.

trust violator and the claimant. Generally, if the claimant is separated from the violator by an intermediate antitrust victim, standing is denied by attaching conclusory labels such as "remote", "indirect", and "consequential". Resurrecting notions of privity, this test thus arbitrarily forecloses otherwise meritorious claims simply because another antitrust victim interfaces the relationship between the claimant and the alleged violator. Moreover, the "direct injury" requirement has engendered among some adherents a regrettable tendency to deny standing to any plaintiff who happens to fall within certain talismanic rubrics: "creditor", "landlord", "lessor", "franchisor", "supplier".[8] This disposition is, we think, unsatisfactory insofar as it transforms judicial inquiry into a mere search for labels.

In contrast, courts employing the "target area" approach focus on claimant's relationship to the area of the economy allegedly injured by the defendant.

> "[T]o state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

8. *See, e.g.*, Kauffman v. Dreyfus Fund, 434 F. 2d 727 (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971) ("shareholder"); Nationwide Auto Appraiser Serv., Inc. v. Ass'n of Cas. & Sur. Cos., 382 F. 2d 925 (10th Cir. 1967) ("franchisor"); Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F. 2d 383 (6th Cir. 1962) ("supplier"); Miley v. John Hancock Mut. Life Ins. Co., 242 F. 2d 758 (1st Cir.), *aff'g per curiam* 148 F. Supp. 299 (D. Mass.), *cert. denied*, 355 U. S. 828 (1957) ("creditor"); Melrose Realty Co. v. Loew's, Inc., 234 F. 2d 518 (3d Cir.), *cert. denied*, 352 U. S. 890 (1956) ("owner-lessor").

Conference of Studio Unions v. Loew's Inc., 193 F. 2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U. S. 919 (1952). To attain standing, a plaintiff must thus allege that the antitrust violation injured a commercial enterprise of the plaintiff in the area of the economy in which the elimination of competition occurred. Standing is denied, on the other hand, if the claimant's commercial activity occurred outside that area of the economy. *See id.* Hence the "target area" approach provides a logical and flexible tool for analyzing whether a particular claimant falls within the class of persons slated by Congress for protection under section 4 of the Clayton Act.

> "[T]he basic and underlying purposes of the antitrust laws [are] to preserve competition and to protect the consumer. Recovery and damages under the antitrust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm."

Id. at 55. *See Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358, 365 (9th Cir. 1955).

The "direct injury" approach to section 4 was implicitly undermined by the Supreme Court in *Perkins v. Standard Oil Co.*, 395 U. S. 642 (1969), *rev'g* 396 F. 2d 809 (9th Cir. 1968). Attention centered on whether "fourth level" price discrimination is proscribed by section 2 of the Clayton Act, as amended by section 13 of the Robinson-Patman Act, 15 U. S. C. § 13. A panel of our court, focusing on the indirect commercial relationship between claimant and defendant, had concluded in the negative:

> "Section 2(a) of the Act does not recognize a causal connection, essential to liability, between a supplier's price discrimination and the trade practices of a cus-

tomer [removed four rungs] . . . on the distributive [sic] ladder . . . ."

396 F. 2d at 816. In the Supreme Court's reversing opinion, Mr. Justice Black admonished that this direct-indirect "limitation is wholly artificial and is unwarranted by the language or purpose of the Act." He reasoned that "the competitive harm done . . . is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer." 395 U. S. at 648. Though applying a different section of the Clayton Act, the opinion argues forcefully by analogy against "direct injury" analysis. The Court eschewed consideration of the nexus between claimant and defendant and concentrated instead on the nature of the "competitive harm".

Direct support of the "target area" approach also emerges from the Supreme Court's opinion in *Perkins, supra.* The plaintiff had appended an auxiliary claim under section 4 for injuries allegedly suffered in his individual capacities as creditor, landlord, and broker. In constructing its analytical framework, our court unfortunately—but quite understandably [9]—indiscriminately juxtaposed cases espousing both the "direct injury" and the "target area" tests. We resurrected notions of privity, and, attaching the determinative "lessor" label, concluded that the plaintiff's claim was comprised of elements not "properly the subject of damages." 396 F. 2d at 815. The Supreme Court's reversal was grounded solely on a "target area" quotation from *Karseal Corp. v. Richfield Oil Corp.,* 221 F. 2d 358, 363 (9th Cir. 1955) that the Court applied con-

9. *See, e.g.,* South Carolina Council of Milk Producers, Inc. v. Newton, 360 F. 2d 414 (4th Cir.), *cert. denied,* 385 U. S. 934 (1966).

sistently with its disposition of the section 2 issue. The Court avoided any categorical characterization of claimant as, for example, a "lessor" or a "creditor", and affirmed the propriety of section 4 relief by emphasizing the economic impact of the anticompetitive conduct.

Perkins therefore clarifies any ambiguity inhering in *Hawaii's* failure to adopt expressly either of the two predominant judicial glosses on the language "by reason of". By repudiating all those aspects of the "direct injury" test that distinguish it from the "target area" approach, and by embracing and applying the latter, the Court in *Perkins,* at least inferentially, impresses its imprimatur upon the "target area" approach articulated by this court: a plaintiff has standing under section 4 of the Clayton Act if the claimed losses fall "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *E.g., Mulvey v. Samuel Goldwyn Productions,* 433 F. 2d 1073 (9th Cir. 1970); *Hoopes v. Union Oil Co.,* 374 F. 2d 480, 485 (9th Cir. 1967); *Karseal Corp. v. Richfield Oil Corp.,* 221 F. 2d 358 (9th Cir. 1955); *Conference of Studio Unions v. Loew's Inc.,* 193 F. 2d 51 (9th Cir. 1951), *cert. denied,* 342 U. S. 919 (1952). A proper application of "by reason of" focuses on whether the anti-competitive conduct directed against an area of the economy injured business operations conducted by the claimant in that sector of the economy. The resulting two-step approach first requires identification of the affected area of the economy and then the ascertainment of whether the claimed injury occurred within that area.

Here the crop farmers complaint alleges that the automobile manufacturers conspired

> "(a) To eliminate all competition among the automobile manufacturers in the research, development, manufacture and installation of motor vehicle air pollution equipment;

> "(b) To eliminate competition . . . in the purchase of patents and patent rights from other parties covering motor vehicle air pollution equipment."

It is manifest from these averments that the area of the economy against which anti-competitive conduct was allegedly directed was that concerned with research, development, manufacture, installation and patenting of automotive air pollution control devices.[10] No commercial interest of the crop farmers falls within this area. Not only were the crop farmers not targets of the alleged conspiracy, they were not even on the firing range. Accordingly, the farmers lack standing under section 4 of the Clayton Act,[11] to maintain this action. Upon remand, therefore, all actions arising under section 4 will be dismissed.

Insofar as the common weal was injured the federal government was the proper party to seek redress; and, in fact, it attempted to do so. *See* Note 1, *supra*. If the Government did not prosecute its action with sufficient vigor, the remedy lies in executive or legislative reform, not in judicial overreaching.

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10. Examples of plaintiffs falling within one or more of these markets, as appellants concede, include an alleged inventor and a manufacturer of motor vehicle air pollution control equipment who claim losses from asserted inability to market their devices.

11. "Standing" under section 4 actually encapsulizes two distinct ingredients. First, a plaintiff must demonstrate that the interests allegedly injured by the defendant fall within the scope of antitrust protection. This requirement, which arises from judicial constructions of "business or property" and "by reason of", is satisfied in the manner set forth in our opinion. A second and distinct ingredient demands that a plaintiff show that the defendant's conduct contributed to his injury. This cause-in-fact requirement also derives from "by reason of". Once these two standing issues are resolved in favor of a plaintiff, the court can proceed to determine if the defendant's conduct violated the antitrust laws and, then, to ascertain the consequent damages.

II. Standing Under Section 16.

Appellees' claims for injunctive relief are based on section 16 of the Clayton Act, 15 U. S. C. § 26, which reads in relevant part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ."

As the Court noted in *Hawaii, supra* at 260, this section varies significantly from section 4 insofar as the broader language of section 16 lacks mention of "business or property", an omission signalling different standing requirements. This treatment is fully justified by the difference between the remedies available under each section. In contrast to section 4, section 16 does not involve punitive and potentially disasterous judgments for treble damages and attorneys' fees;[12] neither is there the potential threat of

12. In antitrust suits, allowance of attorneys' fees is limited to that proportion of the fee attributable to a successful suit for damages. If only equitable relief is sought or obtained, counsel fees are generally not awarded to a successful plaintiff. *See* Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 482 (S. D. N. Y. 1970) (dictum) *modified on other grounds and aff'd*, 449 F. 2d 51 (2d Cir. 1971), *rev'd on other grounds*, 41 U. S. L. W. 4131 (U. S. Jan. 10, 1973); Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490, 491 (D. Mass. 1963) (dictum), *vacated on other grounds*, 333 F. 2d 798 (1st Cir.), *cert. denied*, 379 U. S. 931 (1964); Decorative Stone Co. v. Building Trades Council, 23 F. 2d 426, 428 (2d Cir. 1928); Ring v. Spina, 84 F. Supp. 403, 408 (S. D. N. Y. 1949) (dictum); Alden-Rochelle Inc. v. American Society of Composers, Authors & Publishers, 80 F. Supp. 888, 899-900 (S. D. N. Y. 1948). *But cf.* Hall v. Cole, 41 U. S. L. W. 4658 (U. S. May 21, 1973) (dictum).

duplicative recoveries. See *Hawaii, supra* at 261-64. Consequently, courts have not exercised the same pronounced restraint in granting standing under section 16 as they have done under section 4. As we observed in *Hawaii v. Standard Oil Co.*, 431 F. 2d 1282, 1284-85 (9th Cir. 1970), *aff'd*, 405 U. S. 251 (1972):

> "[Section 16] is far broader than § 4. Any person may secure injunctive relief against threatened loss or damage by violation of the antitrust laws. Section 4 provides for recovery of treble damages only by a person injured in his business or property by [reason of] such a violation."

Unlike standing under section 4, standing under section 16 does not require an injury to "commercial interests" but only an injury cognizable in equity. For example, housing segregation enforced by an antitrust conspiracy of realtors constitutes an injury to excluded minority members that confers standing for injunctive relief under section 16, *see Bratcher v. Board of Realtors*, 381 F. 2d 723 (6th Cir. 1967), although not for treble damages under section 4. Since all appellees herein have alleged "threatened loss or damage" to interests cognizable in equity,[13] they have standing to seek equitable protection under section 16 of the Clayton Act.

We emphasize that we now intimate no conclusions as to either the merits of the equitable claims or the availability of any form of injunctive relief. These issues must, in the first instance, be resolved by the District Court.

III. Parens Patriae.

At common law, the concept of *parens patriae* invested the English Sovereign with powers and duties—the "royal

13. *See, e.g.*, Georgia v. Pennsylvania R. R., 324 U. S. 439 (1945); Georgia v. Tennessee Copper Co., 206 U. S. 230 (1907).

prerogative''—to protect certain interests of his subjects. *See Hawaii, supra* at 257-60. In this country the *parens patriae* function expanded somewhat and devolved upon the states that, to some extent, ceded it to the federal government. *See Massachusetts v. Mellon,* 262 U. S. 447, 485-86 (1923); *Pubilc Utilities Commission v. United States,* 356 F. 2d 236, 241 n.1 (9th Cir.), *cert. denied,* 385 U. S. 816 (1966). Hence, the federal government and the states, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances sue as *parens patriae* to vindicate interests of their citizens. *E.g., Hawaii, supra; Georgia v. Pennsylvania Railroad Co.,* 324 U. S. 439 (1945); *North Dakota v. Minnesota,* 263 U. S. 365 (1923); *Pennsylvania v. West Virginia,* 262 U. S. 553 (1923); *New York v. New Jersey,* 256 U. S. 296 (1921); *Georgia v. Tennessee Copper Co.,* 206 U. S. 230 (1970); *Kansas v. Colorado,* 206 U. S. 46 (1907); *Missouri v. Illinois,* 180 U. S. 208 (1901); *Louisiana v. Texas,* 176 U. S. 1 (1900). On the other hand, political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae,* although they might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants.

We have already concluded that, inasmuch as appellee states failed to allege any injury to their ''commercial interests'', they lack standing *qua parens patriae,* or in any other capacity, to seek relief under section 4 of the Clayton Act. Moreover, our court has recently held that a state cannot sue as *parens patriae* under section 4 on behalf of its citizen-consumers for injuries suffered by them. *California v. Frito-Lay, Inc.,* 474 F. 2d 774 (9th Cir. 1973). Their *parens patriae* suit under section 16 of the Clayton Act, however, presents a separate but readily manageable issue.

In *Georgia v. Pennsylvania Railroad Co., supra,* the Supreme Court upheld Georgia's *parens patriae* action under section 16 for an injunction against a conspiracy between large railroad companies. The analysis of that case rendered in *Hawaii, supra* at 259-60, bespeaks the continuing availability of *parens patriae* actions under section 16 for injunctive relief for injuries to a state's economy. Insofar as the state appellees have alleged injury to their economies, they have standing under section 16. In reaffirming this principle, we quote the presaging language of Mr. Justice Holmes:

> "[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.
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> "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . that the forests on its mountains . . . should not be further destroyed or threatened . . . that the crops and orchards on its hills should not be endangered . . . ."

Georgia v. Tennessee Copper Co., supra at 237-38.

IV. Class Actions.

In light of our determination that all appellees lack standing to seek antitrust damages, the District Court must reevaluate the propriety, under Fed. R. Civ. P. 23(b)(3),

of the class actions for equitable relief.[14] In addition, the court may need to examine the applicability of Fed. R. Civ. P. 23(b)(2). Both in anticipation of probable changes among the parties plaintiff, and in deference to the accumulated experience of district courts in framing classes under Rule 23, we deem it inappropriate at this juncture to comment further upon the class action issues.

Affirmed in part; reversed and remanded in part.

WILLIAM ELY,
Circuit Judge.

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14. While we do not reach the issues of predominance or manageability under Rule 23(b)(3), we note that problems could have arisen in that respect. *See* Eisen v. Carlisle & Jacquelin, 41 U. S. L. W. 2586 (2d Cir. May 1, 1973). *Compare e.g.*, Chicken Delight, Inc. v. Harris, 412 F. 2d 830 (9th Cir. 1969) *with* Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N. D. Cal. 1967). Of particular concern might have been the putative class of farmers, over 115,000 in number, who produce a variety of crops in differing localities and conditions throughout the United States. *Cf.* Diamond v. General Motors Corp., 20 Cal. App. 3d 374, 97 Cal. Rptr. 637 (Ct. App. 1971). *See generally* Wright & Miller, 7A Federal Practice and Procedure: Civil § 1781 (1972).

United States Court of Appeals
FOR THE NINTH CIRCUIT.

No. 71-1241.

DC Nos. 70-541; 70-1044; 70-1477;
70-1137; 70-853; 70-846 MLR.

IN RE MULTIDISTRICT VEHICLE
AIR POLLUTION M. D. L. No. 31,

STATE OF CALIFORNIA, ET AL. ROBERT MORGAN, CITY OF PHILADELPHIA, ET AL. STATE OF NEW YORK,

Plaintiff-Appellees,

v.

AUTOMOBILE MANUFACTURERS
ASSOCIATION, INC., ET AL.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

JUDGMENT.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part; reversed and remanded in part.

Filed and entered June 4, 1973

OPINION OF THE UNITED STATES DISTRICT COURT.

In re Multidistrict Private Civil Treble Damage Antitrust Litigation involving MOTOR VEHICLE AIR POLLUTION CONTROL EQUIPMENT.

M. D. L. No. 31.

United States District Court,
C. D. California.

Sept. 4, 1970.

Memorandum Order (Re Motion to Dismiss).

REAL, District Judge.

Defendants have brought motions to dismiss 15 of the 16 complaints filed in this matter. Defendants have classified the grounds as 1. No Antitrust Injury; 2. No Parens Patriae Claims; 3. No Injunctive Relief; and 4. The Handy Complaint and they will be dealt with herein in that order.

BACKGROUND.

January 10, 1969 the United States of America filed its complaint alleging against the major defendants herein violation of Section 1 of the Sherman Act (15 U. S. C. § 1). The acts of conspiracy alleged therein are, without change, the acts alleged in the actions herein. The action by the United States resulted in a consent decree approved by Judge Jesse W. Curtis of the Central District of California in United States of America v. Automobile Manufacturers Association, Inc. et al., 307 F. Supp. 617, No. 69-75-JWC.

The conspiracy enjoined in the consent decree includes as pertinent to the actions filed herein:

1. To prevent, restrain or limit the development, manufacture, installation, distribution or sale of air pollution control equipment for motor vehicles;
2. Adhering to agreements with reference to patents and patent rights.

After attempts to intervene in action No. 69-75-JWC met with failure, actions have been filed by plaintiffs herein variously in individual, class and parens patriae capacities.

ANTITRUST INJURY.

Title 15, United States Code, Section 1 provides in its pertinent part:

"§ 1. Trusts, etc. in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal."

Title 15, United States Code, Section 15 provides in its pertinent part:

"§ 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Defendants' thrust upon the motion in dismiss is that there is not alleged, nor can there be alleged a "com-

mercial relationship" between plaintiffs and defendants permitting compensation for the claimed damages. For purposes of the motion to dismiss the court must assume the "injury" alleged.[1]

In terms of the development of the anti-trust laws, the concept of source of injury alleged herein is rather new. It was not until 1947, that any recognition of pollution as anything more than a seasonal and infrequent nuisance like hay fever or summer cold came to the public of the United States. It was not until 1952, that any blame was laid at the door of the automobile industry and not until 1969, that anyone recognized that allegedly something could be done about it except for the conspiracy of defendants alleged in action No. 69-75-JWC. We are now concerned with the phrase "injured in his business or property *by reason of anything* forbidden in the anti-trust laws" in the light of the allegations of these complaints, rather than the traditional, legalistic approach defined by the cases cited by defendants in their motion to dismiss. Each of the plaintiffs alleged injury to their respective business or property *by reason of* anti-trust violations of the defendants.

Plaintiffs may fail in their proof, but until then, they should be given the benefit of employing "any avaliable remedy to make good the wrong done."[2]

PARENS PATRIAE CLAIMS.

The status of parens patriae cannot be used to substitute for a class action as to individual claims of the residents of political subdivision.

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1. Dailey v. Quality School Plan, Inc., 380 F. 2d 484 (5th Cir. 1967); Knuth v. Erie-Crawford Dairy Coop. Association, 395 F. 2d 420 (3d Cir. 1968).

2. Bell v. Hood, 327 U. S. 678, 684, 66 S. Ct. 773, 777, 90 L. Ed. 939 (1946); J. I. Case Co. v. Borak, 377 U. S. 426, 433, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964).

The question of validity of the parens patriae suit as applied to the economy of the governmental entities herein is answered in State of Georgia v. Pennsylvania Railroad Company, 324 U. S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1944) and State of Hawaii v. Standard Oil Company of California, 301 F. Supp. 982 (D. Hawaii, 1969) and needs no amplification here.

INJUNCTIVE RELIEF.

The function of the judge assigned cases pursuant to Title 28, United States Code, Section 1407, is to coordinate pretrial proceedings with the view of returning cases to the transferor judge in condition to be tried expeditiously to the benefit of all parties to the litigation. Defendants' attack upon the prayer for injunctive relief in 14 of the 15 complaints to which the motion to dismiss has been addressed is, at this point in this litigation, premature.

The Court has not been advised nor can it conjure any situation in which discovery will be delayed or, more onerous, simply because of the request for additional relief by way of injunction, prohibitory or mandatory.

It may well be that a trial judge, after hearing the evidence may determine that the grant of an injunction which parallels the relief of the consent decree in action 69-75-JWC is unwarranted. But pre-judging at this stage of the litigation, that plaintiffs may not be able to present some peculiar need for further injunctive relief is not the function of this Court. The prayers for relief are within the jurisdiction of this Court given the proof of facts alleged. Whether it is necessary or desirable is for the trial judge or development of these cases to where they may be subject to disposition without trial. We have not yet reached that posture of the cases. If we ever do depends upon the parties.

THE HANDY COMPLAINT.

Defendants' motion to dismiss attacks Count II of the Handy complaint. Count II alleges violation of "plaintiffs' right to clean air and to a safe and healthy environment, free from the contaminants and pollutants which have resulted, and continue to result, from the operation of automotive vehicles, and the use therein of gasoline, which vehicles and gasoline were, and still are, manufactured, distributed and sold by defendants," all protected by the Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, Section 1983 and Section 1988 (Civil Rights Act).

Plaintiff Handy would have this Court establish a right to clean air and a safe and healthy environment within the penumbra of the United States Constitution and its amendments. Clearly no extensions have been made by the courts except where there has been governmental intrusion into the privacy of its citizens.

The invitation to the Court to now rule that private corporations, though drawn to gigantic proportions, are public utilities or have the functions of a government is declined. These constitutional and statutory provisions do not create or permit any cause of action for a solely private intrusion.

All Cases Except Sturtz v. General Motors.

Memorandum Order (Re Class Actions).

The propriety of the maintenance of class actions or class action claims is questioned by defendants in 15 of the 16 cases pending before this Court for consolidated pretrial proceedings.

The broadest claims of class representation are found in the *Grossman, Philadelphia, Lackawanna* and *Handy*

complaints.[1] These complaints purport to represent all persons in the United States.

The *Morgan* case[2] alleges class claims by all the farmers of the United States.

Complaints of *Illinois, New Jersey, New Mexico, Connecticut* and *Wisconsin*[3] claim classes of all people within their respective states and their political subdivisions.

Political subdivisions, public corporations and authorities within the state are represented in the *New York* complaint.[4]

Residents are represented in the *City of New York, City and County of Denver* and *Keane* complaints.[5]

California's[6] representation is narrowed to "all persons who own property, real or personal, or who conduct a business within the State of California damaged as the result of air pollution caused by automobiles."

Each of the class actions are attacked by defendants on the failure to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Federal Rules of Civil Procedure Rule 23 provides in its pertinent part:

"Rule 23. Class Actions.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative

1. See Appendix A(1).
2. See Appendix A(2).
3. See Appendix A(3).
4. See Appendix A(4).
5. See Appendix A(5).
6. See Appendix A(6).

parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Defendants' primary attack on the class action status of this litigation is directed to the absence of common questions of law and fact which predominate over questions individual to the class members and the unmanageability of the classes alleged.

COMMON QUESTIONS OF LAW AND FACT.

Classically the visceral issues of any litigation are liability on the part of a defendant and damage on the part of a plaintiff. Certainly one can, within the framework of these basic issues, conjure a plethora of factual and legal issues which must be resolved before a decision can be reached in the trial of a case. Unlike most litigation, treble damage (private) anti-trust liability presents the determination of three issues, (1) conspiracy (monopolization, etc.), (2) impact and (3) damage.[7] Certainly the question of conspiracy is one which, as alleged herein, is common not only to the class within each separate action but also to all of the actions filed. This is an issue which should, in the interest of justice, need be litigated only once.

The intrusion of impact into the consideration of the liability aspect of these cases create a difficulty which cannot be easily answered. Philadelphia Electric Co. v. Anaconda

7. Haverhill Gazette Co. v. Union Leader Corp., 333 F. 2d 798, 803 (1st Cir. 1964), cert. denied 379 U. S. 931, 85 S. Ct. 329, 13 L. Ed. 2d 343 (1965); Winckler & Smith Citrus Products Co. v. Sunkist Growers Inc., 346 F. 2d 1012, 1041 n. 1 (9th Cir. 1965).

American Brass Co., 43 F. R. D. 452 (E. D. Pa. 1968); State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N. D. Ill. 1969); In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Water Meters, 304 F. Supp. 873 (Jud. Pan. Mult. Lit. 1969) if they are authority for the separation of issues are clearly distinguishable. All of the cases herein allege a peculiar type of anti-trust injury, i.e., injury resulting from a pollution caused by the conspiracy to hinder and delay the research, development, manufacture and installation of effective motor vehicle air pollution control equipment. It is in effect a conspiracy to maintain a public nuisance—smog. Impact is as varied as the public itself. In Philadelphia Electric Co. v. Anaconda American Brass Co., *supra,* State of Illinois v. Harper & Row Publishers, Inc., *supra,* and In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Water Meters, *supra,* the courts are considering price fixing conspiracies in violation of the anti-trust laws—where "impact" and "buyer" become almost synonymous. If you qualify as a "buyer" of the commodity in question the liability—damage issues—except as to *amount* of damage—lend themselves to common determination.

Grossman, Philadelphia, Lackawanna, Handy, City of New York, City and County of Denver and *Keane* cannot be maintained as class actions.

Although there may be some differences in the effect of smog on various crops or the fauna and flora of a state, political subdivision, public corporation or public authority, the pleadings as they now stand do allege a class properly represented in *Morgan, Illinois, New Jersey, New Mexico, Connecticut, Wisconsin, New York* and *California* with respect to common issues of law and fact which predominate over questions affecting only individual members.

MANAGEABILITY OF THE CLASS.

Manageability of the classes alleged herein may certainly tax the imagination and ingenuity of the litigants, counsel and the court. But until management is recognized as impossible or near impossible, the Court will depend upon the ingenuity and aid of counsel to solve the complex problems this litigation may bring. If successful, the economies of time, effort and expense will more than compensate the effort.

REPRESENTATION OF THE CLASSES.

The complaints of *Illinois, New Mexico, California, Wisconsin, New York, Connecticut, New Jersey, Philadelphia* and *Lackawanna* allege representation by a governmental entity of the individual residents within its jurisdiction. Putting aside the status of parens patriae for a moment, the question raised is the adherence to the principle that a plaintiff representative must be a member of the class purportedly represented.[8] It is conceivable that a governmental agency might, with reference to a particular act or series of acts, stand in the same position as an individual resident within its jurisdiction. But in the context of the acts alleged herein and any impact and/or damage resluting therefrom, a governmental agency raises issues which are peculiar only to its status as a governmental agency. It cannot, therefore, be a member of the class of citizens or residents and cannot maintain a class action on behalf of individual plaintiffs.

The representation of governmental agencies as a class is, of course, properly the subject of a class action. Since more than one action alleges representation of the class, determination of *the* representative governmental agency must be made. That question, or its resolution, does not at

8. Rock, Drilling, Blasting, Roads, Sewers, Viaducts, Bridges, Foundations, Excavations & Concrete Work, etc., Local Union No. 17 v. Mason & Hangar Co. (S. D. N. Y. 1950) 90 F. Supp. 539.

this juncture affect the proceedings herein and is left for later determination by agreement of the parties and failing that, hearing and determination by the Court.

APPENDIX A.

1. Marshall B. Grossman et al. v. Automobile Manufacturers Association, et al. 69-1855-R
   City of Philadelphia, etc. v. Automobile Manufacturers Association, Inc., et al. 70-846-R
   County of Lackawanna, Pa., et al. v. Automobile Manufacturers Association, Inc., et al. 70-858-R
   C. Jon Handy et al. v. General Motors, Inc., et al. 69-1548-R
2. Robert Morgan, etc. v. Automobile Manufacturers Association, Inc., et al. 70-853-R
3. The State of Illinois v. Automobile Manufacturers Association, Inc., et al. 70-1042-R
   State of New Jersey v. American Motors Corporation et al. 70-1041-R
   State of New Mexico v. American Motors Corporation et al. 70-1040-R
   State of Connecticut v. American Motors Corporation et al. 70-1043-R
   State of Wisconsin v. General Motors Corporation et al. 70-806-R
4. The State of New York v. Automobile Manufacturers Association, Inc., et al. 70-1137-R
5. The City of New York, et. v. Automobile Manufacturers Association, Inc., et al. 70-1477-R
   City and County of Denver v. American Motors Corporation, et al. 70-1044-R
   Thomas E. Keane et al. v. General Motors Corporation et al. 70-1039-R
6. State of California et al. v. Automobile Manufacturers Association, et al. 70-541-R

ORDER OF THE UNITED STATES DISTRICT COURT.

The Order of the district court reads, in relevant part, as follows:

ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR AN AMENDMENT TO CERTIFY FOR INTERLOCUTORY APPEAL; AMENDED ORDER RE CLASS ACTIONS AND MOTION TO DISMISS FOR ALL CASES EXCEPT *STURTZ v. GENERAL MOTORS* AND *AMF, INC. v. GENERAL MOTORS:* AND CERTIFICATION PURSUANT TO 28 U. S. C. § 1292(b)

UPON CONSIDERATION OF DEFENDANTS' MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR AMENDMENT TO CERTIFY FOR INTERLOCUTORY APPEAL, AND IN ORDER TO MAKE THE RECORD CORRECTLY REFLECT THIS COURT'S DECISION, IT IS ORDERED THAT DEFENDANTS' SAID MOTION FOR RECONSIDERATION, ETC. BE, AND THE SAME HEREBY IS, DENIED EXCEPT AS HEREAFTER PROVIDED AND THAT THIS COURT'S ORDER OF SEPTEMBER 4, 1970 BE, AND HEREBY IS, AMENDED TO READ AS FOLLOWS:

I. CLASS ACTIONS

* * *

II. MOTION TO DISMISS

1. *Defendants' Motion to Dismiss is Granted as to the following, each of which is hereby dismissed:*

* * *

2. ***Defendants' Motion to Dismiss is Denied as to:***

• • •

(n) Morgan Case No. 70-853-R: individually; and "all other farmers in the United States who raise crops".

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-391

ROBERT MORGAN,

Petitioner,

v.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is now reported at 481 F.2d 122.

QUESTION PRESENTED

Whether petitioner, a California farmer, may sue for damages under Section 4 of the Clayton Act for a diminished crop yield claimed to result from increased air pollution assertedly caused by respondent automobile

manufacturers' alleged conspiracy to restrain competition in the development, manufacture and installation of emission control devices on motor vehicles.

INTRODUCTION

This action, brought by a California crop farmer in the Eastern District of Pennsylvania on behalf of a class of all farmers in the United States, is one of thirty-eight cases which have been consolidated for co-ordinated pretrial proceedings in the Central District of California. *In re Motor Vehicle Air Pollution Control Equipment*, 311 F. Supp. 1349 (J.P.M.L. 1970).[1] Petitioner seeks damages under the antitrust laws for alleged injuries to his crops from air pollution said to be traceable to an agreement among respondents not to compete in the development, manufacture, and installation of emission control devices on motor vehicles. He claims to represent "hundreds of thousands" of farmers throughout the United States who raise crops of any kind.[2]

---

[1] *See Washington* v. *General Motors Corp.*, 406 U.S. 109, 116 n.7 (1972). These cases were inspired by the civil antitrust action filed by the federal government against some of the respondents, which was terminated by entry of a consent decree on October 29, 1969. *United States* v. *Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom., City of New York* v. *United States*, 397 U.S. 248 (1970). When he approved entry of the consent decree, Judge Curtis pointedly noted for the record the "novel and unadjudicated theory" of the government's case, 307 F. Supp. at 621.

The District Court for the Central District of California has set for trial the injunctive claims under Section 16 of the Clayton Act, 15 U.S.C. § 26, in two of the cases originally filed in that court. Motions for summary judgment against the plaintiffs in those cases are presently under consideration by the Court, as is a motion relating to the availability of the equitable relief the plaintiffs are seeking.

[2] The Court of Appeals did not reach the class question, but strongly suggested that the purported farmer class would be im-

Petitioner does not allege any connection with or involvement in any transaction in that area of the economy which he alleges was restrained by respondents' conduct, *i.e.*, the development, manufacture, and installation of motor vehicle emission control devices. He does not even claim to be a purchaser of a vehicle manufactured by a respondent or to have suffered injury resulting from any commercial dealings with respondents. Indeed, petitioner concedes in this Court that "[h]e has no indirect or direct market relationship with the [automobile] industry . . . ." Pet. at 26. Rather, petitioner claims only that respondents' alleged agreement to eliminate competition in the development of control equipment (Complaint, para. 23) resulted in hindering and delaying the development of such equipment (Complaint, para. 24), which in turn resulted in the emission of additional air contaminants into the atmosphere (Complaint, para. 25), which in turn contributed to photochemical reactions resulting in the formation of "smog" (Complaint, para. 19), which in turn caused damage, in some unspecified manner and amount, to his crops (Complaint, para. 19, 26).

Accordingly, respondents moved to dismiss petitioner's claim for damages on the ground that he failed to satisfy the statutory requirements for standing to sue under Section 4 of the Clayton Act, 15 U.S.C. § 15. The district court denied the motion (Pet. App. at A20), but certified the question to the Court of Appeals under 28 U.S.C. § 1292(b).

The Court of Appeals reversed, holding that petitioner did not have standing under Section 4. Declaring unac-

---

proper because of the predominance of individual questions arising from the fact that the large number of farmers whom petitioner sought to represent "produce a variety of crops in differing locations and conditions throughout the United States." Pet. App. at A18 n. 14. These differences would require extensive individual proof on the issues of impact and damages as well as cause great administrative problems.

ceptable any approach which would "arbitrarily foreclose otherwise meritorious claims," the court rejected the use of "talismanic rubrics" to decide questions of standing. Pet. App. at A9. Instead, the Court of Appeals held that Section 4 should be available to any person suffering commercial injury as a result of his participation in

> "that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[3]

In applying this basic principle the Court of Appeals adopted a two-step approach:

> "[1] identification of the affected area of the economy . . .
>
> "[2] ascertainment of whether the claimed injury occurred within that area." Pet. App. at A12.

In taking step one, the court relied on petitioner's complaint to identify "research, development, manufacture, installation and patenting of automotive air pollution control devices" as the relevant "affected area of the economy"—that is, the "target area" of the alleged conspiracy. Pet. App. at A12. In taking step two, the court below concluded that:

> "No commercial interest of the crop farmers falls within this area." *Id.*

Accordingly, the court ruled that petitioner did not have standing under Section 4.[4]

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[3] Pet. App. at A12, quoting *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). *See also Mulvey* v. *Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Hoopes* v. *Union Oil Co. of Calif.*, 374 F.2d 480 (9th Cir. 1967); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955).

[4] *Id.* The Court of Appeals also ruled that the governmental entity plaintiffs, who have brought 33 of these 38 consolidated cases, lacked standing under Section 4 because they alleged no injury to

ARGUMENT

I. The decision of the Court of Appeals applied well-established principles governing standing under Section 4 of the Clayton Act and raises no question justifying issuance of the writ of certiorari.

Petitioner's primary contention in this Court is that the court below erred in imposing any limitation upon standing under Section 4 other than that a treble damage plaintiff must have suffered some injury. In petitioner's view, the lack of any commercial relationship here between the injury claimed and the alleged violation is simply irrelevant.[5] This Court has consistently rejected such contentions. The antitrust laws do "not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945); *see also Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). Indeed, the position advanced by petitioner was rejected by this Court as recently as *Hawaii* v. *Standard Oil Co. of Calif.*, 405 U.S. 251 (1972). In *Hawaii* this Court, citing ten decisions of the Courts of Appeals, noted with approval that "[t]he lower courts have been virtually unanimous in

---

their "business or property." Pet. App. at A6. These plaintiffs have not sought review of the decision below; but their claims for relief under Section 16 are still under consideration in the District Court, the Court of Appeals having "intimate[d] no conclusions as to either the merits of the equitable claims or the availability of any form of injunctive relief." Pet. App. at A15.

[5] Similarly, petitioner evidently sees no significance in the attenuated nature of the causal relationship between his claimed injury and the alleged violation. To be sure, petitioner appears at certain points in his brief not to take issue with what he says is the unanimous view of the Court of Appeals that " 'remote' or 'incidentally' damaged parties cannot sue to redress antitrust violations." Pet. at 8; *cf.* Pet. at 26. Yet given the remote and incidental nature of his own injury, as portrayed in the allegations of his complaint (see p. 3, *supra*), it seems clear that petitioner is really contending that an allegation of any cause-and-effect linkage between violation and injury—no matter how weak or how long—is enough to confer standing under Section 4.

concluding that Congress did *not* intend the antitrust laws to provide a remedy in damages *for all injuries that might conceivably be traced to an antitrust violation.*" *Id.* at 263 n.14 (1972) (emphasis supplied).

Petitioner's demand for a change in the standing requirements of Section 4 is premised largely upon an out-of-context use of language in such cases as *Radovich* v. *National Football League*, 352 U.S. 445, 453 (1957), *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Company*, 364 U.S. 656, 660 (1961) and *Mandeville Island Farms Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). In none of these cases, however, was there any question of the plaintiff's participation in the economic "target area" endangered by the alleged violations. In each case the issue before this Court was whether a violation of the substantive provisions of Section 1 was properly alleged, not whether the plaintiff had standing to bring an action under Section 4. In *Radovich* and *Radiant Burners* the plaintiffs were engaged in the very lines of commerce where the alleged restraints had occurred: professional football and gas powered appliances. Similarly, in *Mandeville* the violation alleged was price fixing by buyers of sugar beets, and plaintiff was a seller of sugar beets.[6]

Under the standing cases noted with approval in *Hawaii*, a claim of some injury is only part of the requisite showing; a treble damage plaintiff must also show that he is a participant in the area of the economy in

[6] It is instructive to compare petitioner's claim with those of two other plaintiffs in the consolidated proceedings below: Sturtz and AMF Corp. All three complaints allege a restraint of trade in the research, development, manufacture and installation of emission control devices. As was the case in *Radovich*, *Radiant Burners*, and *Mandeville*, plaintiffs Sturtz (an inventor of emission control devices) and AMF (a manufacturer of devices) allege that the effect of this alleged conspiracy to restrain trade was to limit their opportunities to participate in the marketplace allegedly affected by respondent's conduct. By contrast, petitioner specifically disavows injury arising from any such market relationship.

which competition is restrained. Petitioner is no doubt correct in observing that some circuits have imposed additional limitations in particular fact situations, while others have not.[7] But this observation does him no good in the present case. There is no dispute whatever among the circuits as to the threshold requirements of injury *plus* a commercial relationship of some kind to the line of commerce allegedly restrained.

If there remain some linguistic differences in the way in which different circuits formulate the test,[8] this case is not an appropriate one for resolution of such differences, since the result would be the same under any of the formulations. Indeed, the court below, relying upon this Court's decision in *Perkins* v. *Standard Oil Co. of Calif.*, 395 U.S. 642 (1969), applied the most liberal test of all. It nevertheless denied standing because petitioner, as he concedes,[9] had no relationship of any kind to the relevant economic area.

Petitioner's suggestion of an "injury-in-fact" test is contravened by every judicial pronouncement in the field. This continuing judicial insistence on some commercial relationship reflects a unanimous assessment of the undesirability of opening the courts to multiple treble damage claims involving the most speculative and conjectural

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[7] For example, decisions of the Third Circuit—which petitioner suggests should govern in his case—have applied *additional* requirements of proximity or directness. Thus, *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) and *Gomberg* v. *Midvale Co.*, 157 F. Supp. 132 (E.D. Pa. 1955), *appeal dismissed sub nom., Brill* v. *General Industrial Enterprises, Inc.*, 234 F.2d 465 (3d Cir. 1956) denied standing under Section 4 because the plaintiff, albeit a participant in the endangered area of the economy, did not allege injury which was sufficiently "direct".

[8] Petitioner has not demonstrated that the application of these "conflicting" tests actually leads to divergent results. He certainly cannot claim that the two tests would lead to different outcomes on the facts of this case.

[9] *Supra*, p. 3.

types of proof, brought by persons who can show no connection with the market structures which the antitrust laws were designed to protect. Petitioner's invitation to discard all established tests applicable to standing under Section 4 should be declined.

II. The Court of Appeals did not err in relying in part on decisions of the Ninth Circuit.

Petitioner also contends that the court below erred by relying on decisions of the Ninth Circuit in construing Section 4. Petitioner appears to claim that the Court of Appeals' failure to rely instead upon the decisions of the Third Circuit, where he originally brought his action,[10] was tantamount to "forum shopping between circuits." Pet. at 12. Petitioner's concern rings false from a California citizen and resident, normally governed by Ninth Circuit decisions, who claims to be subject only to "Third Circuit law" because he chose to file his complaint in a federal court in Philadelphia. In any event, petitioner's contention does not withstand analysis.

In this Court petitioner claims to be entitled to a so-called Third Circuit standing test, although, as noted above, he does not and cannot argue that application of such a test would compel a different result in his case. Yet in the Court of Appeals petitioner belittled any differences between the antitrust standing tests applied in the Third and Ninth Circuits. In his brief below, petitioner characterized the Ninth Circuit's target area approach as "merely a picturesque expression" for the asserted test of the Third Circuit (Brief for Appellees at 15).[11] Indeed, petitioner's brief below affirmatively

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[10] Petitioner's case was transferred by the Multi-District Panel to the Central District of California for consolidated pretrial proceedings under 28 U.S.C. § 1407, along with numerous other related cases filed in various federal districts.

[11] *See also* Brief for Appellees at 23, 25, 28.

urged the Court of Appeals to rely upon the principles established in the Ninth Circuit: it accused respondents of a refusal "to give account to the principle that emerges from the developing law in this [the Ninth] Circuit". *Id.* at 22.

Petitioner's new position in this Court is purportedly based upon principles applied in diversity cases and limitations imposed by 28 U.S.C. § 1407. But the fact that the federal courts have a constitutional duty to apply the law of a particular state in diversity cases does not support petitioner's notion that a Court of Appeals must follow the "law" of another Circuit in construing federal statutes which are supposed to apply uniformly throughout the country. Nor does petitioner explain what there is about 28 U.S.C. § 1407 that prevents a Court of Appeals, on appeal from the decision of a Section 1407 transferee judge, from relying upon any appropriate authority in construing a federal statute or from acting as it would in any other case. "Section 1407", it has recently been held, "deals *only* with the powers of the Multi-District Litigation Panel, and not with the powers of the judge to whom the cases have been assigned by the Panel." *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 124 (2d Cir. 1971) (emphasis in original).

In short, having successfully urged the court below to apply the liberal standing principles developed in the Ninth Circuit but having failed to meet even the minimal test required by those principles, petitioner now seeks intervention by this Court because the court did not

apply the allegedly different law of another Circuit. This is not a matter worthy of the Court's plenary attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 1973.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-394

ROBERT MORGAN, *Petitioner*

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, Inc., et al., *Respondents*

PETITION FOR REHEARING

Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-394

ROBERT MORGAN, *Petitioner*

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, Inc., et al., *Respondents*

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of November 19, 1973, denying the petition for writ of certiorari, and that upon rehearing a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-394

ROBERT MORGAN, *Petitioner*

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, Inc., et al., *Respondents*

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of November 19, 1973, denying the petition for writ of certiorari, and that upon rehearing a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Before the filing of the petition for writ of certiorari ("petition"), which was denied by the Court on November 19, Judge Manuel Real of the Central District of California had upheld various damage and injunctive claims, including petitioner's. On interlocutory appeal under 28 U.S.C. §1292(b), the Court of Appeals for the Ninth Circuit reversed the district judge's holding only as to the *damage* claims, ruling that petitioner (and all other plaintiffs) lacked standing under §4 of the Clayton Act, 15 U.S.C. §15. Although petitioner (alone among all plaintiffs)[1] was concededly injured in his "business or property", the court of appeals held that he was not within the "target area" of the alleged conspiracy.

The injunctive portion of these cases was remanded to the district court for further proceedings. On November 21, 1973, *two days* after the Court denied the petition, Judge Real entered a memorandum opinion and order denying all of the injunctive claims and dismissing the cases.[2] This new development, together with the decision of the court of appeals, evidences a considerable diminution of the scope and efficacy of the nation's antitrust laws—the very result which petitioner implored the Court to forestall by issuing the writ (Petition, Part V, pp. 22-27).

In his opinion, Judge Real recognized the substance of petitioner's claims:

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1. All other plaintiffs were non-federal governmental entities—states, cities, and counties.

2. The opinion is reprinted in the Appendix, *infra*, pp. A1-A13. The only remaining claims are two comparatively minor actions filed by manufacturers of pollution control devices who allege that they have been foreclosed from competition in the sale and installation of such devices. *AMF, Inc. v. General Motors Corp.*, C.D. Cal., Civil Action No. 71-16R; *Sturtz v. General Motors Corp.*, C.D. Cal., Civil Action No. 69-1892R.

> "A cooperative program to attempt to find the root causes of automobile air pollution and to develop some control that would reduce or eliminate the automobile as a source of air pollution was inaugurated with the execution of a so-called "cross-licensing agreement" dating back to 1955. "Cooperation," as contemplated by the cross-licensing agreement, not only provided for the exchange of technical data but also prevented any defendant from releasing information relating to, or from announcing the use of, any developed control device without the concurrence of the other defendants.
>
> * * * All of these claims notwithstanding, the cooperative efforts of the defendants were less than spectacular; and often the cross-licensing agreement was used to advance the selfish aims of some of the individual defendants. Consequently, we must now consider whether these actions, taken both cooperatively and individually, are violative of the antitrust laws of the United States."

(Appendix, *infra*, pp. A7-A8).

The district judge went on to state, without explicitly deciding whether the conduct of the defendants violated the antitrust laws, that the equitable remedy sought was calculated to cure a nuisance and not an antitrust violation.

The scope of §4 of the Clayton Act, providing for private relief in antitrust cases, has been considerably constricted by the "direct injury" and "target area" tests adumbrated by various circuits in the eighteen years since the Ninth Circuit decided the *Karseal* case.[3] It was the dichotomy between these two tests, and the inadequacy of both tests, which petitioner invited the Court to resolve in the petition for certiorari. In light of the observations in

3. *Karseal Corp. v. Richfield Oil Corporation*, 221 F.2d 358 (9th Cir. 1955).

that petition, the practical consequences should the district court's latest decision be reaffirmed by the court of appeals would clearly impair the public interest.

The conspiracy that petitioner (and other plaintiffs) alleged in the *Multidistrict Vehicle Air Pollution* cases is perhaps the largest in United States economic history. In terms of its economic and environmental impact, the consequences of the conspiracy dwarf those of any prior antitrust case. These consequences include the noxious effects of environmental pollution which today ranks as one of the nation's foremost problems. The relationship between the pollution problem and the "energy crisis" is obvious. It is an interplay which is judicially cognizable and need not be chronicled here. Furthermore, petitioner's assertion that this economic conspiracy is unparalleled in its consequences cannot readily be disputed.

Petitioner has *never* suggested that all pernicious consequences of the automobile manufacturers' conspiracy are recoverable as damages under §4 of the Clayton Act. Indeed, petitioner concedes that §4 *limits* the potential liability under the nation's antitrust laws to those who can show a direct or primary nexus between the violation and injury to their "business or property." 15 U.S.C. §15. As the Court of Appeals found below, petitioner, as a farmer[4], was the only appellant-plaintiff who could successfully plead "injury" to "business or property" within the meaning of §4. Furthermore, it is possible that only a small percentage of the country's farmers have suffered damage to their crops as a direct consequence of environmental pollution caused by the conspiracy alleged below.

Nevertheless, in light of the recent dismissal of injunctive claims by the district court, the present posture of this case casts serious doubt upon the efficacy of this nation's antitrust laws as implemented by the courts.

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4. Petitioner Morgan is a substantial crop-grower in Southern California, whose crop-yields have been diminished by some of the most severe environmental pollution in the United States.

Unless this Court at least hears this case, the largest horizontal conspiracy in United States economic history will go unredressed, and, what is worse, unheard by the Court in spite of its public importance and a crying need to resolve conflicts among the circuits on a pervasive rule of law. Those injured as a direct and primary consequence of the conspiracy have no recourse whatsoever. Indeed, the dismissal of the injunctive portions of the action ensures that the perpetrators of this conspiracy cannot even be directed to assist in ameliorating its noxious effects. Nor can those damaged as a primary result (which petitioner concedes is a limited class) be even partially compensated.[5]

Petitioner submits that this result undermines the proper administration of the antitrust laws. We think it appropriate and compelling that this monumental case, on its own merits, be reviewed by our nation's highest Court. Unquestionably, liability under §4 is limited. However, petitioner respectfully submits that this limitation should not extend so far as to excuse the nation's *largest* companies from virtually *all* consequences of this horizontal conspiracy. That result would not be consonant with either the letter or the spirit of the Clayton Act.

We beseech the Court to grant review so that a farmer who has been injured in his business and property by the horizontal conspiracy of the automobile manufacturers may at least be permitted to present the facts and legal contentions in support of his position. Only in this way will simple justice be done. Only in this way will due process of law truly be served.

---

5. As we noted in the petition (fn. 7, p. 25), the "competitor cases" (see fn. 2, *supra*) involve several strong defenses not relevant to petitioner's cause of action. Additionally, the potential damages in these cases are insignificant when compared to the scope, effect, and direction of the actual conspiracy.

CONCLUSION

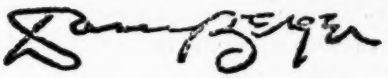
For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing of the petition be granted, and, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit. Alternatively, in light of the district court's dismissal of the injunctive claims, petitioner respectfully requests permission to renew this petition should the injunctive portions of this case ever reach the Court.

Respectfully submitted,

DAVID BERGER
H. LADDIE MONTAGUE, JR.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.



DAVID BERGER
Counsel for Petitioner

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE:	M.D.L. DOCKET NO. 31
MULTIDISTRICT VEHICLE AIR POLLUTION	Memorandum Opinion and Order

This matter is now before the Court upon remand from the Court of Appeals for the Ninth Circuit in *In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (1973), (hereafter *MDL 31*). Pursuant to Rule 16 of the Federal Rules of Civil Procedure, the Court undertakes to fulfill the admonition of the appellate court after its rejection of plaintiffs' damage claims to resolve what is a fundamental issue of this litigation in its present posture.

The court in *MDL 31, supra*, leaves to this Court the resolution of the availability of equitable relief with this caveat:

> "We emphasize that we now intimate no conclusions as to either the merits of the equitable claims or the availability of any form of injunctive relief. These issues must, in the first instance be resolved by the District Court." Id. at 131.

Since resolution of these issues can affect all CCS and class action plaintiffs,[1] they have been given notice by liaison counsel affording them the opportunity to supplement the authorities presented by plaintiffs State of California and State of Washington, and to request a hearing upon any matters which they felt might not have been adequately covered by these plaintiffs and which affect the

[1] CCS plaintiffs are those city, county and state plaintiffs requesting equitable relief generally by way of retrofit.

position of all CCS and class action plaintiffs vis-a-vis the availability of equitable relief.

Plaintiff's have asked for equitable relief primarily by way of requiring defendants, at their own expense to retrofit[2] automobiles which defendants have manufactured and sold to the public without effective air pollution control devices.

Plaintiffs ground their claim of right to equitable relief in the antitrust laws of the United States as articulated in section 16 of the Clayton Act [15 U.S.C. §26] which provides in its pertinent part:

> "§26. Injunctive relief for private parties; exception
>
> Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief . . ., against threatened loss or damage by a violation of the antitrust laws . . ., when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

The statutory language, without the benefit of judicial interpretation[3] clearly permits private parties[4] to obtain an injunction against "threatened loss or damage" caused by an antitrust violation. Defendants would have the Court limit its equitable powers under section 16 simply to remedy the "*threatened conduct*" of the defendants which

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[2] Retrofit is the installation of presently available air pollution control devices upon all automobiles not presently so equipped from the factory. It also includes updating certain automobile air pollution control devices to present day technological advances in the air pollution field.

[3] It is not suggested that judicial interpretation is absent. Case law clearly supports the conclusions drawn here.

[4] Section 16 of the Clayton Act [15 U.S.C. §26] was enacted to put private persons in parity with the United States in obtaining injunctive relief in antitrust cases. See 51 Cong. Rec. 14214-14215 (1914).

has, concededly, been effectively proscribed by the consent decree in *United States v. Automobile Mfrs. Assn.*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. New York v. United States*, 397 U.S. 248 (1970).[5]

Yet, the Supreme Court has also made clear that affirmative acts may be required of defendants whenever necessary, not only to proscribe future conduct but also "to redress the antitrust violation proved", *United States v. du Pont & Co.*, 366 U.S. 316, 323, 6 L.Ed. 2d 318, 323, 81 S. Ct. 1243 (1961); "to undo what could have been prevented . . .", *Schine Theatres v. United States*, 334 U.S. 110, 128, 92 L.Ed. 1245, 1258 (1948); or to "cure the ill effects of the illegal conduct", *United States v. United States Gypsum*, 340 U.S. 76, 88, 95 L.Ed. 89, 100 (1950); reiterated in *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64, 35 L.Ed. 2d 104, 113 (1973). Reading the language of the statute and applying the rationale of the decided cases, two conclusions are inescapable: 1. "threatened" as it modifies both "loss or damage" and "conduct" encompasses not only the future as it relates to the adjudication of liability to assure free competition, but also *continuing* "loss or damage" which may have been caused by "conduct" already terminated; and 2. that this Court may exercise the full panoply of its traditional equitable powers to remedy all otherwise irreparable "loss or damage" that a plaintiff properly before the Court can prove.[6] Equitable relief, either in its traditional concepts of prevention of continuing irreparable harm or in its antitrust application, "is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing claims.' . . . The availability [of equitable relief] should be 'conditioned by the necessities of the public interest which Congress has sought to protect' ".

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[5] "Concededly" because plaintiffs in argument stated "they [the defendants] are now competing like crazy".

[6] Although defendants disagree with the opinion of the Court of Appeals in *MDL 31*, *supra*, plaintiffs were given "standing" to seek equitable relief.

Zenith Radio Corporation v. Hazeltine Research Inc., 395 U.S. 100, 131, 23 L.Ed.2d 129, 152, 89 S. Ct. 1562 (1968).

Defendants, though not denying the Court's power to grant equitable relief to correct antitrust violations, do strongly urge that the exercise of a Court's equitable powers in antitrust cases is limited to the maintenance or restoration of competition. Plaintiffs, on the other hand, looking for the broadest relief possible once a violation has occurred, would have the Court look to all possible tort remedies to cure the effects of what they describe as the "continuing injury caused by their [the defendants] unlawful conspiracy". However, what the Court must do, in exercising the full panoply of its equitable powers, is to act in "the public interest which Congress has sought to protect" (*Zenith Radio Corporation v. Hazeltine Research Inc., supra)* by its enactment of the antitrust laws.

This Court has recognized that a party may "be given the benefit of employing 'any available remedy to make good the wrong done' ". *In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment No. 31* (C.D. Cal. 1970), 52 FRD 398, 399. The recognition of such a principle of justice, as compelling as it might appear, does not permit this Court to disregard the purpose and intent of Congress in the enactment of specific remedies for the violation of specific, statutorily created, rights. If the plaintiffs have any equitable relief available to them, the Court must, at this juncture in the litigation, find an antitrust application to the established contentions of the parties. This process requires a review, and a determination of the permissible parameters of the protections afforded by the antitrust laws.

Thus, the broad mandate to courts that relief shall be given "under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by court of equity, under the rules governing such proceedings, . . . does not permit a court, for instance, to redress an intentional tort or a nuisance under the aus-

pices of a plaintiff seeking entry into a Federal courtroom through the guise of an antitrust violation not related to the purpose of the enactment of any of the antitrust laws of the United States.

Plaintiffs' contentions are that the cross-license agreement of 1955[7] *and* other, somewhat undefined, acts of delay in the development of automobile air pollution control devices,[8] together make up the claimed violation of the antitrust laws. Yet, among the issues that plaintiffs

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[7] Pertinent to plaintiffs' claims are the following provisions of the agreement dated July 1, 1955, and signed by all defendants:

> "Article V—Exchange of Technical Data and Other Information
>
> Each of the parties hereto further agrees to exchange through its authorized representative of the remaining parties hereto all technical data and other information pertaining to said Licensed Devices. Such exchange of technical data and other information shall be conducted under the direction of the Vehicle Combustion Products Subcommittee of the Engineering Advisory Committee of the Automobile Manufacturers Association."

Through the Engineering Advisory Committee operating pursuant to this agreement, defendants agreed to withhold publication of development data and to withhold offering for public use developed devices for air pollution control except with the concurrence of all the parties.

The cross licensing agreement itself creates no illegality under the antitrust laws. *Standard Oil Company (Indiana) v. United States*, 283 U.S. 163, 75 L.Ed. 926 (1930), *Cutter Laboratories, Inc. v. Lyophile-Cryochem Corp.* 179 F.2d 80 (9th Cir. 1949).

[8] For instance plaintiffs contend that defendants delayed installation of positive crankcase ventilation systems (PCV) from at least the start of the 1960 model year until the 1961 model year in California and the 1963 model year nation wide or that defendants delayed installation of closed crankcase controls from at least the start of the 1961 model year until January 1, 1964 in California and until the 1968 model year nation wide. There are, in addition, other contentions of delay, none of which differ substantially from those set forth here. Plaintiffs' Contentions of Fact—Threatened Injury.

concede are not concerned in this lawsuit are: 1. the proof of any specific delay *in the development* of air pollution control devices; and 2. the proof of any conspiracy[9] affecting the development of automobile air pollution control devices by third party manufacturers, *i.e.*, there exists no conspiracy to prevent others from freely engaging in the business of manufacturing or marketing automobile air pollution control devices. With these exclusions in mind, we can, for the purpose of determining the availability of equitable relief, assume that there was some agreement to delay the installation of known and/or readily producible air pollution control devices on automobiles manufactured by defendants.

With these concessions, plaintiffs would then have this Court decide the *availability* of equitable relief with merely an antiseptic "yes" or "no". In other words, plaintiffs contend that the pleadings and the Court of Appeals giving them *standing* are dispositive of the issue of the availability of the remedy. Contrary to plaintiffs' urging, however, the decision of the Court of Appeals in *MDL 31*, *supra*, neither suggests nor compels such a disposition of this important litigation. The decision leaves this Court free to address the totality of the issue now, in the light of largely completed discovery and of the comprehensive factual contentions of all the parties before the Court. Although, plaintiffs and defendants differ as to the interpretation they would have this Court draw from a reading of the many documents upon which each rely, these disputes do not affect the consideration of the availability of equitable relief.

Antitrust laws, since their first enactment in July 1890, have been considered a charter of Economic Liberty aimed at preserving free and unfettered competition—no more and no less. They are not intended—nor do they purport to be—a panacea to cure all the ills that befall our citizenry

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[9] Limited solely to the cases of CCS and class action plaintiffs.

by the accident that some damage or injury may have been caused by a business enterprise.

Nonetheless, plaintiffs claim that defendants' conduct is violative of the antitrust laws because defendants were delaying the development of effective automobile air pollution control devices, and that this delay has caused, and is continuing to cause, injury to the plaintiffs. Hence, what plaintiffs say they want is:

> ". . . a decree which will stop a continuing injury to the air and which will restore their air quality as much as possible and as soon as possible to the state of purity it would have been *but for* defendants' acts." (Memorandum of Plaintiffs on Equitable Relief p. 3.)

What, then, this case really involves is the abatement of a nuisance created by a purported antitrust conspiracy. We must, therefore, analyze what plaintiffs ask for in the way of relief in light of what is now apparent they propose to prove.

Smog is the product of the internal combustion engine; and, appropriate to our discussion, its cause is the widespread use of the automobiles manufactured and marketed by the defendants. That smog is bothersome and that every effort must be made to eradicate it need no documentation here. It is sufficient, for our purposes only, to recognize that the Odyssey of vehicle air pollution control really begins with the realization that the automobiles manufactured by defendants are the source of a substantial amount, if not all, of our current smog problems. In response to the discovery in the early 1950s that the automobile was the culprit, and to mounting pressures from the public, the defendants somewhat reluctantly undertook to alleviate the public pressures by conduct that occasionally bordered on the legerdemain.

A cooperative program[10] to attempt to find the root

[10] "Cooperative" would appear euphemistic in light of the agreed evidence of defendant Chrysler's insistence upon its theory

causes of automobile air pollution and to develop some control that would reduce or eliminate the automobile as a source of air pollution was inaugurated with the execution of a so-called "cross-licensing agreement" dating back to 1955. "Cooperation," as contemplated by the cross-licensing agreement, not only provided for the exchange of technical data but also prevented any defendant from releasing information relating to, or from announcing the use of, any developed control device without the concurrence the other defendants.

It is the defendants' claim that, absent this cooperative effort, it is impossible to envision the frustrations and failures that may have been visited upon the individual efforts to eliminate the causes and effects of automobile air pollution. Yet each defendant, in its own way, claims major contributions to the development of air pollution control devices now being used in contemporary automobiles. All of these claims notwithstanding, the cooperative efforts of the defendants were less than spectacular;[11] and often the cross-licensing agreement was used to advance the selfish aims of some of the individual defendants.[12] Consequently, we must now consider whether these actions, taken both cooperatively and individually, are violative of the antitrust laws of the United States.

Plaintiffs contend that the conduct of defendant is violative of the antitrust laws and urge upon the Court, in support of their requested relief, the language of Mr. Justice Holmes in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-238, 51 L.Ed. 1038, 1045 (1907), that "It is a fair and reasonable demand on the part of a sovereign that the air

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Note 10—*Continued*
of air pollution control by engine modification rather than by device.

[11] Giving some credence to the theory that only when government undertakes to put some profit motive into the solution of our scientific problems, will industry undertake any enthusiastic and really successful effort within any reasonable period of time. See, *e.g.*, our space program.

[12] See footnote 8, *supra*.

over its territory should not be polluted. . . ." But, *Georgia v. Tennessee Copper Co., supra*, does not really come to the aid of the plaintiffs. A reading of the case leaves only the conclusion that it is the law of nuisance [not antitrust] that dictated the availability and scope of legal and/or equitable relief that could be given plaintiff, State of Georgia, in its parens patriae claim for injunctive relief to secure the private and public interests of its citizens which had been invaded by defendant Tennessee Copper. To make more of the case is simply unwarranted, either by analogy or by its unequivocal language.

Moreover, defendants here are automobile manufacturers[13] competing during the period significant to plaintiffs' claims in the manufacturer of automobiles for sale to the American public. No claim is made by plaintiffs that any combination or conspiracy in violation of the antitrust laws occurred in connection with this aspect of defendants' business. It is as a result of this competition and the monumental use of the smog producer's internal combustion engine, that substantial discomfort and sometimes actual illness have been suffered by uncountable millions of Americans. This conduct is the sole and proximate cause of smog.[14] It may, of course, amount to the creation of and maintenance of, and/or causing the maintenance of a public nuisance; but this nuisance is not the result of any conspiracy or combination in restraint of trade. It is, if anything, the consequence of the free marketing of a smog producing product. Is this, then, an evil the cure to which is found in section 16 of the Clayton Act [15 U.S.C. §26]? Defendants' conspiracy, as now defined by plaintiffs, is one addressed not to the marketplace, but rather to joint tort feasors refusing, or delaying in, the

[13] It is insignificant to this conclusion that defendant Motor Vehicle Manufacturers Association (MVMA) does not manufacture or market automobiles.

[14] This statement is made recognizing that the automobile, though a very substantial contributor is not the only source of smog.

abatement of an existing and continuing public nuisance. Assuming, without deciding, that such a conspiracy (*i.e.*, maintaining a nuisance) is unlawful, the redress for such unlawful conduct, is not found in the antitrust laws. Plaintiffs, however viewed, would attempt to squeeze a nuisance body into an antitrust form; but the form has no legislative or judicial capacity to accept it.

Recognizing the difficulties inherent in their claim, plaintiffs invite the Court to depart from the traditional application of the antitrust laws to find a solution to this most perplexing social problem. No Court faced with the opportunity to perform such a public service could resist the temptation to be innovative despite the skillful attempts of defendants to dissuade it from such a course with the virtually Orwellian threats of mechanical impossibility. Courts are—like Tevya[15]—concerned with tradition. The right to sue either for damages or equitable relief for antitrust violations is not court created; and in light of this fact, it is incumbent upon courts to limit relief in antitrust cases to the "necessities of the public interest *which Congress has sought to protect*". *Zenith Radio Corporation v. Hazeltine Research Inc., supra* [Emphasis ours.]

The 80 year history of the antitrust litigation discloses that courts have, without exception, related equitable relief in antitrust cases to the restoration of, or maintenance of, competitive conditions in the marketplace. The only purpose of the antitrust laws was—and is—the guarantee of a free marketplace in which an unsophisticated consumer can be assured of the best possible product for the least possible expense.

Mr. Justice Frankfurter has observed that "wisdom too often never comes and so one ought not to reject it merely because it comes late."[16] Yet, departure from "tradition" can only be justified when innovation is the

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[15] Fiddler on the Roof.

[16] *Henslee v. United Planters National Bank & Trust Company*, 335 U.S. 595, 600, 93 L.Ed. 259, 264 (1948).

product of wisdom. Certainly, in the battle against smog the hour is late, and the invitation to provide an innovative solution to it is tempting—and most flattering; but unfortunately the wisdom has not yet come.

Plaintiffs have made many other suggestions for possible equitable relief. These include, for instance, requiring the defendants to establish a program for testing automobile emissions and for measuring ambient air quality; establishing computerized systems for increasing traffic flow and speed; assisting in the establishment of improved and expanded mass transportation services, and other programs, all of which go beyond any power of this Court to grant even if one presumes the defendants' liability for the acts complained of in plaintiffs' instant litigation.

The decision of this Court upon the issue of which defines the scope of the Court's equitable power antitrust cases affects all the cases in *M.D.L. Docket 31* in which equitable relief is sought by CCS or class action plaintiffs. Dismissals, therefore, shall be entered in the following cases:

> *Marshall B. Grossman, et al. v. Automobile Manufacturers Association, Inc., et al.*, No. 69-1855-R; *The State of California, et al. v. Automobile Manufacturers Association, Inc., et al.*, No. 70-541-R; *State of Wisconsin v. General Motors Corporation, et al.*, No. 70-806-R; *City of Philadelphia v. Automobile Manufacturers Association, Inc., et al.*, No. 70-846-R; *County of Lackawanna, Pennsylvania, et al. v. Automobile Manufacturers Association, Inc.*, No. 70-858-R; *Thomas E. Keane, et al. v. General Motors Corporation, et al.*, No. 70-1039-R; *State of New Mexico v. American Motors Corporation, et al.*, No. 70-1040-R; *State of New Jersey v. American Motors Corporation, et al.*, No. 70-1041-R; *The State of Illinois v. Automobile Manufacturers Association, Inc., et al.*, No. 70-1042-R; *State of Connecticut v. American Motors Corporation, et al.*, No. 70-1043-R; *City and County of Denver v.*

American Motors Corporation, et al., No. 70-1044-R; *The State of New York v. Automobile Manufacturers Association, Inc., et al.*, No. 70-1137-R; *The City of New York, et al. v. Automobile Manufacturers Association, Inc., et al.*, No. 70-1477-R; *The State of Minnesota v. Automobile Manufacturers Association, Inc., et al.*, No. 70-2107-R; *State of Washington, et al. v. General Motors Corporation, et al.*, No. 71-611-R; *The Commonwealth of Virginia v. Automobile Manufacturers Association, Inc., et al.*, No. 71-805-R; *The State of Missouri v. Automobile Manufacturers Association, Inc., et al.*, No. 71-806-R; *The State of Iowa v. Automobile Manufacturers Association, Inc., et al.*, No. 71-807-R; *The State of Ohio v. Automobile Manufacturers Association, Inc., et al.*, No. 71-958-R; *State of Kansas v. General Motors Corp., et al.*, No. 71-959-R; *State of Vermont v. Automobile Manufacturers Association, Inc., et al.*, No. 72-960-R; *Commonwealth of Pennsylvania v. Automobile Manufacturers Association, Inc., et al.*, No. 71-961-R; *The State of Rhode Island v. Automobile Manufacturers Association, Inc., et al.*, No. 71-962-R; *State of Texas v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1019-R; *State of Florida v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1020-R; *State of Louisiana v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1021-R; *State of Mississippi v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1022-R; *Commonwealth of Kentucky v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1023-R; *State of Alabama v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1024-R; *The Commonwealth of Massachusetts v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1025-R; *State of South Dakota v. General Motors Corporation, et al.*, No. 71-1026-R; *State of Oklahoma v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1027-R; *The State of Arizona v. Automobile Manufacturers Association, Inc., et al.*,

No. 71-1224-R; *Commonwealth of Puerto Rico v. Automobile Manufacturers Association, Inc., et al.*, No. 71-1565-R.

Dated: November 20, 1973.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE